Supreme Court, U.S.
FILED

96 1811 MAY 8 1997

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No. ____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

TERRY MORRIS, et al.,

Petitioners,

v.

JOHN L. WRIGHT, et al.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

ON APRIL 26, 1996, THE PRISON LITIGATION REFORM ACT OF 1996 (THE "PLRA" OR THE "ACT") WENT INTO EFFECT. AMONG OTHER THINGS, THE ACT ESTABLISHES AN ADMINISTRATIVE EXHAUSTION REQUIREMENT FOR PRISONER CIVIL RIGHTS CASES. *SEE* 42 U.S.C. § 1997e(a). TWO QUESTIONS ARISE UNDER THE ACT CONCERNING CASES PENDING ON THE DATE OF ITS ENACTMENT:

I

WHETHER CONGRESS EXPLICITLY PROVIDED THAT THE STATE-EXHAUSTION REQUIREMENTS ESTABLISHED BY THE PLRA APPLY ONLY TO CLAIMS FILED AFTER ITS EFFECTIVE DATE?

II

WHETHER, IN THE ABSENCE OF EXPLICIT GUIDANCE FROM CONGRESS, THE DEFAULT RULES OF *LANDGRAF V. U.S.I. FILM PRODUCTS*, 511 U.S. 244 (1994), CONFIRM THAT THE PLRA'S STATE-EXHAUSTION REQUIREMENTS APPLY TO CASES PENDING ON THE DATE OF ENACTMENT?

LIST OF PARTIES

Petitioners are state officials from Ohio, Michigan, Kentucky and Tennessee who were the Appellees in *Wright v. Morris*, Case No. 95-4160; *Birdo v. Berry,* Case No. 95-6366; *Corley v. Bennett*, Case No. 95-6451 and *Thaddeus-X v. Blatter*, Case No. 95-1837 in the Sixth Circuit. They are as follows:

Wright
Terry L. Morris
William B. Carmich
Susann Dunn
Roger T. Overberg
Nicu J. Sandborn
Don Lubbering
Nancy Howard
Tracy Palmorous
Chris Gaven

Berry
Steve Berry

Corley
Debbie Burnett
Flora Holland

Thaddeus-X
James Karazim
Allen Blatter
Terry Bildner
Stace Graham
Don Sparks

Respondents are the Appellants in the *Wright*, *Birdo*, *Corley* and *Thaddeus-X* cases and are state prisoners in Ohio, Michigan, Kentucky and Tennessee. They are:

John L. Wright
Tanaka Lee Birdo
Edward Corley
Thaddeus X
Ernest Bell, Jr.

In addition to the above Petitioners and Respondents, the following private citizens were Appellees in *Wright* but took no part in the consolidated portion of that appeal and are not parties to this petition:

Donald Roller
Larry Pavey

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OPINIONS AND JUDGMENTS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit, entered on April 11, 1997, is reported. *See Wright v. Morris, et al.*, ___ F.3d___; A-1. The district court decisions, which the Sixth Circuit consolidated in this appeal, are unreported. *See Wright v. Morris,* Case No. C1-93-00149 (S.D. Ohio, Sept. 29, 1995), *aff'd,* Case No. 95-4160 (6th Cir. Mar 11, 1997); *Corley v. Burnett*, Case No. 3-95-0974 (M.D. Tenn., Oct. 11, 1995), *aff'd,* Case No. 95-6451 (6th Cir. April 11, 1995); *Birdo v. Berry*, Case No. 94-CV-74621-DT (W.D. Ky. Sept. 19, 1995), *aff'd*, Case No. 94-00645 (6th Cir. 1997); *Thaddeus-X v. Blake*, Case No. 94-CV-74621-DT, (E.D. Mich., July 11, 1995), *rev'd,* ____ F.3d ____ (6th Cir. April 11, 1997).

JURISDICTIONAL STATEMENT

The opinion of the United States Court of Appeals for the Sixth Circuit concerning these consolidated cases was entered on April 11, 1997. (A-1). Jurisdiction exists under 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

> APPLICABILITY OF ADMINISTRATIVE REMEDIES--No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. § 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a).

STATEMENT OF THE CASE

In the decision below, the court of appeals consolidated four prisoner civil rights appeals originating in the States covered by the Sixth Circuit -- Kentucky, Michigan, Ohio and Tennessee. Each case originally sought injunctive and monetary relief arising from the conditions of the inmate's confinement. Each case was filed before April 25, 1996. Each case was dismissed at the district court level on substantive grounds. And each case was timely appealed to the Sixth Circuit.

On April 25, 1996, after each of the four cases had been briefed on appeal but before they had been decided, the Prison Litigation Reform Act of 1996, P.L. 104-134 § 801; 110 Stat. 1321 (the "PLRA" or the "Act") went into effect. Among other things, the PLRA amended 42 U.S.C. § 1997e(a), requiring prisoners to exhaust all administrative remedies under State law before seeking relief in federal court concerning the conditions of their confinement.

Soon after the PLRA went into effect, the Sixth Circuit consolidated the four cases for additional briefing concerning the question of whether the Act applied to these appeals. After the court appointed counsel for each of the respondents, the parties submitted additional briefs on the issue and presented oral argument on December 5, 1996. Neither the consolidated briefing nor the oral argument addressed the merits of the underlying appeals.

On April 11, 1997, the Sixth Circuit (Engel, Merritt (dissent), *Moore*) held that the PLRA amendments to § 1997e(a) do not apply to cases pending on the date of their enactment. Claiming that the language of the amendment ("no action shall be brought") textually limited the Act to prospective application, the Court initially concluded that

there was no need to resort to the default rules of *Landgraf v. U.S.I. Film Products*, 511 U.S. 244 (1994). In the alternative, the Court concluded that even under the default rules of *Landgraf*, the amendment applied only to prisoner claims filed after April 24, 1996, when the PLRA went into effect. Judge Merritt dissented, finding that § 1997e(a) limits the jurisdiction of the federal courts and therefore applies to pending cases. He also relied on the fact that § 1997e(a) regulated procedure rather than primary conduct and that it would result in higher quality, more efficient resolution of prisoners' claims. (A-19 *et seq.*).

On the same day it issued this decision and in view of its interpretation of the PLRA, the court separately issued four opinions addressing the merits of the appeals. In unreported opinions, the court affirmed the dismissal of the Kentucky, Ohio and Tennessee claims. In a separate published opinion, the court reversed the dismissal of the Michigan case. Judgment was entered on the same day in each case. These separate decisions are not being appealed at this time.

On April 29, 1997, petitioners filed a motion to stay the Sixth Circuit's mandate in accordance with Fed. R. App. P. 41(b). To petitioners' knowledge, that motion has not yet been addressed.

REASONS FOR GRANTING THE WRIT

The decision below presents two federal issues of great importance: Did Congress explicitly limit application of the PLRA's state-exhaustion requirements to cases filed after the law went into effect? And, in the event Congress did not provide explicit guidance on this issue, do the default rules of *Langraf v. U.S.I. Film Products*, 511 U.S. 244 (1994), confirm that these state-exhaustion requirements

apply to pending cases? As both questions implicate a growing conflict of authority among the lower courts, involve exceedingly important federal questions, and were incorrectly decided below, we respectfully submit that the writ should be granted.

I. CONGRESS DID NOT EXPLICITLY LIMIT APPLICATION OF THE PLRA'S STATE-EXHAUSTION REQUIREMENTS TO CASES FILED AFTER ITS EFFECTIVE DATE.

A. The Decision Below Exacerbates A Growing Conflict Among The Circuits.

In holding that Congress explicitly limited application of the PLRA's state-exhaustion requirement to prospective application, the court relied on language in the amendment providing that "no action shall be brought" until a prisoner has exhausted his administrative remedies. 42 U.S.C. § 1997e(a). In the court's view, this language showed that Congress textually restricted the amendments to cases filed after the PLRA's effective date -- April 25, 1996. Whether accurate or not, that conclusion sharpens a conflict among the circuits.

On the one hand, the Sixth Circuit was not alone in reaching this conclusion. The result parallels a decision of the Seventh Circuit, in which the court held that the similarly-worded provisions of 28 U.S.C. § 1915(g) are textually limited to cases "brought" after the PLRA's enactment. *Abdul-Madood v. Hatman*, 91 F.3d 1023, 1025 (7th Cir. 1996). On the other hand, the approach followed by the Sixth and Seventh Circuits has not been followed in decisions from the Fifth, Eighth and Tenth Circuits. In

addressing similar questions under the PLRA -- whether Congress explicitly made the Act applicable only to future cases -- these circuits did not find dispositive similar textual direction from Congress. The decisions thus each held that use of the word "bring" (or its variations) did not foreclose application of the PLRA to pending cases. *See Green v. Nottingham*, 90 F.3d 415, 418 (10th Cir. 1996) (construing 28 U.S.C. § 1915(g) which provides that "in no event *shall* a prisoner *bring* a civil action" after previously abusing *in forma pauperis* status) (emphasis added); *Adepegba v. Hammons*, 103 F.3d 383, 385 (5th Cir. 1996) (same); *Strickland v. Rankin County Correctional* Facility, 105 F.3d 972, 973 (5th Cir. 1997) (construing 28 U.S.C. § 1915(a)(2) which provides that "a prisoner seeking *to bring* a civil action or appeal" shall comply with certain procedures) (emphasis added); *Jensen v. Clarke*, 94 F.3d 1191, 1202 (8th Cir. 1996) (construing 42 U.S.C. § 1997e(d) which limits attorney fees "in any action *brought* by a prisoner") (emphasis added).

Several district courts have reached conclusions similar to the Fifth, Eighth and Tenth Circuits. *See Lyons v. Vandekrol*, 940 F. Supp. 1433, 1435 (C.D. Iowa 1996) (construing 28 U.S.C. § 1915(g)); *Harris v. Lord*, 1997 U.S. Dist. Lexis 2667, slip op. at *4 (S.D. N.Y. March 7, 1997) (construing 42 U.S.C. § 1997e(e) which provides that "no federal civil action may be brought" without a prior showing of physical injury); *Thomas v. Hill*, 1997 U.S. Dist. Lexis 5448, slip op. at *12 (N.D. Ind. April 4, 1997) (same).

The Sixth Circuit's decision also diverges from holdings of the Second, Fifth and Ninth Circuits to the effect that the PLRA as a whole does not contain an express statement concerning its temporal scope. *See Coveno v. Reopel*, 89 F.3d 105, 106 (2d Cir. 1996), *cert. denied,* 117 S. Ct. 1265 (1997); *Ayo v. Bathey*, 106 F.3d 98, 100 (5th

Cir. 1997); *Marks v. Slocom*, 98 F.3d 494, 495-496 (9th Cir. 1996). Finally, the Sixth Circuit's decision conflicts with the Ninth Circuit's practice of remanding cases predating the PLRA for evaluation under § 1997e(a). *See St. Hilaire v. Arizona*, 1996 U.S. App. Lexis 16778, slip op. at *7 (9th Cir. June 19, 1996); *Berry v. Gomez*, 1997 U.S. App. Lexis 3234, slip op. at *7 (9th Cir. Feb. 20, 1997).

Under these circumstances, the first question presented raises an issue that has divided the lower courts on two levels: (1) Does the "no action shall be brought" language of 42 U.S.C. 1997e(a) specifically limit the provision to future cases? (2) Do restrictions on "bringing" causes of action, as used throughout the PLRA, generally provide explicit congressional direction that the affected provisions apply only to future cases? Both issues have been resolved differently by the lower courts. The disagreement warrants review.

B. The Question Presented Has Great National Importance.

The temporal reach of the PLRA also presents a matter of great significance to the States, most notably because it affects a staggering number of pending cases. According to the Administrative Office of the Federal Courts, approximately 31,000 prisoner civil rights cases were pending shortly before the enactment of the PLRA. *Federal Judicial Caseload Statistics* (Administrative Office of the United States Courts, March 31, 1996). Because the "no action shall be filed" language of § 1997e(a) parallels in relevant respects other provisions of the PLRA, the decision below has the potential to affect each of these cases. But even limiting the impact of the decision to the state-exhaustion requirements of 1997e(a) and to cases within the Sixth Circuit alone, the impact is significant. As Judge

Merritt noted in his dissent below, application of the state-exhaustion requirements within the Sixth Circuit will affect roughly 500 appeals. (A-19).

These numbers have more than mere statistical import. The problem addressed by the PLRA -- excessive prisoner lawsuits -- has placed unique burdens on the States' administration of their prison systems. As the drafters of the PLRA well knew, inmate litigation has diverted staff from their immediate responsibilities, undermined morale and staff effectiveness, hindered discipline and increased State prison costs. *See generally* A. Champagne and K. Haas, *The Impact of Johnson v. Avery on Prison Administration*, 43 Tenn. L. Rev. 275, 291-295 (1976); K. Engel and S. Rothman, *The Paradox of Prison Reform: Rehabilitation, Reform and Violence*, 7 Harvard Journal of Law and Public Policy 413, 431-433 (1984); J. Marquat and B. Crouch, *Judicial Reform and Prisoner Control: The Impact of Ruiz v. Estelle on a Texas Penitentiary*, 19 Law and Society Rev. 557, 579-581 (1985); R. Doumar, *Prisoner Cases: Feeding the Monster in the Judicial Closet*, 14 St. Louis U. Pub. L. Rev. 21, 27 (1994); *see also* C. Hall, *Ring Used Religion to Sneak Drugs into Lorton*, The Washington Post, Sept. 27, 1996, A-1 (prison staff failed to take action to stop drug smuggling, prostitution, and the production of pornography because prisoners "routinely intimidated guards by threatening to sue them...'we had correctional officials who were afraid to do their jobs'").

As this Court has recognized, these concerns cannot be lightly dismissed. "It is difficult to imagine," the Court has held, "an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973). Application of the PLRA to pending cases, we

submit, will directly advance the law's goals of addressing these concerns. The importance of the question presented, in short, independently supports the writ.

C. The Sixth Circuit Erred In Holding That Congress Expressly Limited The PLRA's State-Exhaustion Requirements To Future Cases.

In addition to implicating a sharp split in the lower courts and involving an important federal question, the decision below also was incorrectly decided. In holding that § 1997e(a) "expressly prescribed the statute's proper reach" under *Landgraf v. U.S.I Film Prods.*, 511 U.S. 244, 280 (1994), the Sixth Circuit placed undue weight on the procedural language of the provision stating that "no action shall be brought" unless the inmate has exhausted State administrative procedures. This error also supports the petition.

In 1996, Congress amended 42 U.S.C. 1997e to read:

> no action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. 1997e(a). The appellate court concluded that this language does not apply to pending cases for two reasons. First, "because 1997e(a) governs only the bringing of actions, it does not affect pending cases." (A-7). Second, because another section of the PLRA explicitly makes the

Act applicable to pending cases, the absence of such language purportedly supports the court's interpretation. (A-7-8).

Neither reason supports the conclusion that Congress "has expressly prescribed the statute's proper reach," as required by *Langraf*. 511 U.S. at 280. As an initial matter, this provision of the PLRA lacks the most express mechanism for providing textual guidance -- an effective date provision. Nowhere does the statute explicitly address whether the Act applies to pending cases. The use of an effective date provision elsewhere in the PLRA makes this omission all the more glaring. Thus, far from reenforcing this portion of the court's analysis, Congress's decision to create an effective date provision in another section of the PLRA undermines the view that Congress expressly addressed the issue here.

Perhaps more importantly, the "shall be brought" language contains a fundamental ambiguity with respect to legislation of this sort. While general limitations on the "bringing" of actions may imply that the provision is only forward looking, that is not always true. The uncertainty stems from the nature of any law creating procedural requirements that must be met in order to obtain relief. It is simply easier as a matter of legislative drafting to say that the action may not be "brought," "instituted" or "filed" until certain procedural requirements have been met. Indeed, most limitations on federal-court review of State prisoner actions are written in precisely this way. But resort to such drafting crutches by no means confirms that the legislature limited application of the law to cases filed after its effective date. It is just as fair to conclude that the legislature adhered to the normal customs for drafting laws about the bringing of a lawsuit, and simply failed expressly to decide whether the new rules applied to pending cases -- a conclusion that makes

particular sense with respect to exhaustion requirements which (unlike statutes of limitations) can be met throughout the litigation.

Nor is this approach foreign to the case law. That is why the Court has applied new laws concerning the "institution" of a proceeding to cases pending on the date of enactment. *See United States v. Alabama*, 362 U.S. 602, 604 n. 3 (1960). That is why the Court has applied new attorney fee provisions predicated "upon the entry of a final order" to cases in which the final order predated the amendment by several years. *See Bradley v. Richmond School Board*, 416 U.S. 696, 709 n.12 (1974). And that is why the Court has applied new administrative notice requirements to cases in which the notice had been given (and the case commenced) more than a year before the amendment. *See Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 273 n.8 (1969). Likewise, the courts of appeal have also applied statutes conditioned upon the occurrence of specific events to cases premised on pre-enactment events. *See Bedoni v. Navajo-Hopi Indian Relocation Commission*, 878 F.2d 1119, 1120 (9th Cir. 1989).

In the final analysis, Congress's use of "shall be brought" language simply does not provide the requisite clear direction needed in this area. Much as in *Landgraf* itself, moreover, "purely prospective application" of the PLRA

> would prolong the life of a remedial scheme, and of judicial constructions of civil rights statutes, that Congress obviously found wanting. Given the high stakes of the retroactivity question, the broad coverage of the statute, and the prominent and specific retroactivity provisions in the 1990 bill, it

> would be surprising for Congress to have chosen to resolve that question through [a less than clear statement].

511 U.S. at 259. In reaching a contrary conclusion, the Sixth Circuit committed reversible error.

II. THE DEFAULT RULES SET FORTH IN *LANDGRAF V. U.S.I. FILM PRODUCTS*, 511 U.S. 244 (1994), CONFIRM THAT THE PLRA'S STATE-EXHAUSTION REQUIREMENTS APPLY TO PENDING CASES.

In addition to concluding that Congress explicitly provided that § 1997e(a) applies only to future cases, the appellate court alternatively concluded that the provision applies only to future cases under the default rules set forth in *Landgraf v. U.S.I. Film Products*, 511 U.S. 244 (1994). This conclusion, too, is mistaken and merits review.

A. The Sixth Circuit's Analysis Fails To Follow *Landgraf* And Other Decisions Of This Court.

First, *Landgraf* makes clear that the "consistent practice of the courts" is to apply changes to jurisdictional grants to pending cases because they 'speak to the power of the court rather than to the rights or obligations of the parties.'" 511 U.S. at 274 (quoting *Republic Nat. Bank of Miami v. United* States, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)). While the court acknowledged this safe harbor, (A-10-13), it found it inapplicable here. The court concluded that the provision merely "addresses a party's right to bring suit in court and does not speak in terms of jurisdiction or the power of the court: it is merely an

exhaustion requirement." (A-11). But just because a provision sets up an exhaustion requirement does not exclude the possibility that it also operates as a jurisdictional bar.

In *Weinberger v. Salfi*, 422 U.S. 749 (1975), the Court considered a statute providing that "no action ...shall be brought under [a federal statute]" unless the claimant first exhausted his administrative remedies. In doing so, *Salfi* determined that the "sweeping and direct" language of the statute, together with its express reference to a jurisdictional provision, 28 U.S.C. 1331, made the law jurisdictional in nature. *Id.* at 756-759. Section 1997e(a) utilizes virtually identical language, language as "sweeping and direct" as the provision in *Salfi*, and it too references jurisdictional provisions by prohibiting actions under "any other Federal law." 42 U.S.C. 1997e(a). Under these circumstances, the jurisdictional nature of section 1997e(a) should be dispositive here. *See also McNeil v. United States*, 508 U.S. 106 (1993) (reaching a similar result in construing the legally indistinguishable provisions of 28 U.S.C. § 2675(a)).

Second, the Sixth Circuit overlooked the procedural nature of § 1997e(a), which itself establishes a *Landgraf* safe harbor for concluding that a change in law applies to pending cases. Courts generally apply procedural changes to existing cases, *Landgraf* teaches, because the parties have a diminished reliance interest in statutes that regulate how disputed primary conduct comes before the courts rather than regulating the propriety of the underlying conduct itself. *Landgraf*, 511 U.S. at 275. Section 1997e(a) in no way establishes new rules concerning the underlying conduct of prisoners and prison staff; it simply makes sure that the prisoners initially seek all available relief under State law before going to federal court. Nor can prisoners establish any plausible reliance interest in prior law, which itself contained an administrative exhaustion requirement, just one

that did not apply in all cases. *See* 42 U.S. 1997e(a)(1) (1995); *Patsy v. Board of Regents*, 457 U.S. 496, 502-12 (1982); *Arvie v. Stalder*, 53 F.3d 702 (5th Cir. 1995). *See also Bradley v. Richmond School Board*, 416 U.S. 696 (1974).

Finally, the Sixth Circuit undervalued the importance of the injunctive nature of the relief requested. Again, under *Landgraf*, laws changing the availability of prospective relief generally apply to pending cases. *Landgraf*, 511 U.S. at 273-274. Because the requested injunctive relief affects the "propriety of prospective relief," *id.* at 273, section 1997e(a) should govern these claims. *See also Cort v. Ash*, 422 U.S. 66, 71, 74 (1975). The lower court's contrary conclusion merits review.

B. The Sixth Circuit's Analysis Conflicts With Decisions From Other Circuits.

The Sixth Circuit's analysis also diverges from decisions of other circuits construing the PLRA. As an initial matter, the Sixth Circuit's decision conflicts with the practice of the Ninth Circuit in applying § 1997e(a). To date, the Ninth Circuit has remanded cases predating passage of § 1997e(a) for consideration under its exhaustion requirements. *See Berry v. Gomez*, 1997 U.S. App. Lexis 3234, slip op. at *7 (9th Cir. Feb. 20, 1997); *St. Hilaire v. Arizona*, 1996 U.S. App. Lexis 16778, slip op. at *7 (9th Cir. June 19, 1996).

In addition, the Sixth Circuit's rejection of one of the most compelling arguments for current application of the law, its jurisdictional nature, is at odds with a number of decisions holding that § 1997e(a) is indeed jurisdictional. *See Bell v. Calderon*, 1997 U.S. Dist. Lexis 4373 (N.D. Cal.

April 3, 1997); *Eakins v. Madrid*, 1996 U.S. Dist. Lexis 19150 (N.D. Cal. Dec. 24, 1996). *See also Hernandez v. Steward*, 1996 U.S. Dist. Lexis 18076 (D. Kan. Nov. 27, 1996).

The decision below also differs from the analyses of several other courts construing provisions of the PLRA that, like § 1997e(a), alter the procedure for bringing inmate claims without altering the substantive grounds for resolving those claims. Thus far, three other circuits have analyzed the appropriateness of applying such provisions to pending cases under *Landgraf* and in doing so have each held that the procedural nature of the amendments makes them applicable to pending cases. *Coveno v. Reopel*, 89 F.3d 105 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 1265 (1997) (new filing fee requirements of 28 U.S.C. § 1915(a) and (b)); *Strickland v. Rankin County Correctional Facility*, 105 F.3d 972 (5th Cir. 1997) (same); *Ayo v. Bathey*, 106 F.3d 98 (5th Cir. 1997) (same); *Adepegba v. Hammons*, 103 F.3d 383 (5th Cir. 1996) (limitations in 28 U.S.C. § 1915 (g) on availability of *in forma pauperis* status to prisoners who have abused it in the past); *Marks v. Slocom*, 98 F.3d 494 (9th Cir. 1996) (screening requirements of 28 U.S.C. § 1915(e)). Section 1997e(a) similarly regulates the procedure inmates must follow in bringing claims in federal court without altering the substantive grounds for resolving those claims. The Sixth Circuit's analysis sharply conflicts with these other decisions.

Third, the Sixth Circuit's conclusions regarding the non-jurisdictional nature of § 1997e(a), a crucial consideration under *Landgraf*, is at odds with decisions from every other circuit that has addressed the retroactivity of a very similar statute. Section 1997e(a) is legally indistinguishable in language and purpose from the exhaustion requirement of 28 U.S.C. § 2675(a). That provision states: "An action shall not be initiated against the

United States" until the claimant has exhausted administrative remedies. *See McNeil*, 508 U.S. at 111. Yet every other circuit has held that this similarly-worded provision is jurisdictional. *See Bowden v. United States*, 106 F.3d 433 (D. C. Cir. 1977); *Cotto v. United States*, 993 F.2d 274, 280 (1st Cir. 1993); *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 510 (2d Cir. 1994); *Liveia v. First National State Bank*, 879 F.2d 1186, 1194 (3d Cir. 1989) *cert. denied* 493 U.S. 937 (1989); *Ahmed v. United States*, 30 F.3d 514, 516 (4th Cir. 1994); *Price v. United States*, 81 F.3d 520 (5th Cir. 1996); *Ezekial v. Michel*, 66 F.3d 894 (7th Cir. 1995); *Wilson v. Drake*, 87 F.3d 1073, 1075-1076 (9th Cir. 1996) *cert. denied* 65 U.S. 3647 (1997); *Kendall v. Watkins*, 998 F.2d 848, 852 (10th Cir. 1993) *cert. denied* 510 U.S. 1120 (1994).

C. The Question Presented Is One Of Great Federal Importance.

As shown in discussing the first question presented by this petition, the problem addressed by the PLRA -- excessive prisoner lawsuits -- causes notable disruptions to the States' prisons, to prison administrators and to the courts. Because the decision below greatly weakens the most comprehensive response to this problem, it has grave consequences to the States. This conclusion is no less true for the second question presented than it is for the first. Indeed, the Court's decision to grant certiorari in *Lindh v. Murphy*, No. 96-6298, would seem directly to support granting the writ here.

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that the Court should grant the writ in this case.

Respectfully submitted,

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Date: May 7, 1997

Nos. 95-4160/6366/6451/1837

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 95-4160

JOHN L. WRIGHT,	:	
Plaintiff-Appellant,	:	
	:	
v.	:	ON APPEAL from
	:	The United States
TERRY L. MORRIS, *et al.*,	:	District Court for
Defendants-Appellees.	:	the Southern
	:	District of Ohio

No. 95-6366

TANAKA LEE BIRDO,	:	
Plaintiff-Appellant,	:	
	:	
v.	:	ON APPEAL from
	:	The United States
STEVE BERRY, *et al.*,	:	District Court for
Defendants-Appellees.	:	the Western
	:	District of
	:	Kentucky

No. 95-6451

EDWARD R. CORLEY, *Plaintiff-Appellant*,	:	
v.	:	ON APPEAL from
	:	The United States
DEBBIE BURNETT, *et al.*, *Defendants-Appellees.*	:	District Court for the Middle District of Tennessee

No. 95-1837

THADDEUS-X AND EARNEST BELL, JR., *Plaintiffs-Appellants*,	:	
v.	:	ON APPEAL from
	:	The United States
BLATTER, *et al.*, *Defendants-Appellees.*	:	District Court for the Eastern District of Michigan

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Decided and Filed April 11, 1997

Before: ENGEL, MERRITT, and MOORE, Circuit Judges.

MOORE, J., delivered the opinion of the court, in which ENGEL, J., joined. MERRITT, J. (pp. 18-23), delivered a separate dissenting opinion.

KAREN NELSON MOORE, Circuit Judge. These four consolidated cases present the question of whether the administrative exhaustion requirement of the Prison Litigation Reform Act of 1996,[1] Title VIII of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104, 134, 110 Stat. 1321, applies to prisoner civil rights cases that were pending before this court when the Act took affect. For the reasons discussed below, we hold that the administrative exhaustion requirement does not apply to appeals already pending on the enactment date.

I. FACTS AND PROCEDURAL HISTORY

We address the merits of plaintiffs' claims in separate opinions; it is therefore sufficient for the purposes of this opinion to note that each of the four plaintiffs is an inmate in one of the four state prison systems in this circuit[2] who filed a pro se suit in the appropriate United States district court under 42 U.S.C. § 1983 challenging the conditions of his confinement. None of the inmates contends that he has exhausted all of the administrative remedies which were available at the time of the alleged violations.[3] The cases

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[1]Although the Act states that it "may be cited as the 'Prison Litigation Reform Act of 1995,'" it was passed by Congress and signed by the President in 1996. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996 § 801.

[2]Plaintiff Wright is incarcerated in Ohio, Plaintiff Birdo in Kentucky, Plaintiff Corley in Tennessee, and Plaintiffs Bell and X in Michigan.

[3]Plaintiff Corley filed an administrative complaint but did not appeal the denial of that complaint to the highest possible administrative level. He argues that, because the time for this final administrative appeal is long past, there is no longer any administrative process available to him and he has therefore met

were filed between 1993 and 1995 and were dismissed by the district courts in 1995. The plaintiffs filed timely appeals.

While these appeals were pending in this court, Congress passed the Prison Litigation Reform Act of 1996 [hereinafter "PLRA" or "Act"], which requires inter alia that inmates exhaust "such administrative remedies as are available" before filing suit challenging prison conditions under § 1983. PLRA § 803(d) (amending 42 U.S.C. § 1997e(a)). The new law was signed by the President on April 26, 1996, and went into affect that same day. *See Lyons v. Ohio Adult Parole Auth.*, 105 F.3d 1063, 1066 (6th Cir. 1997) (statutes become affective when enacted absent indication to contrary). The clerk of this court chose one case from each state within this circuit and asked attorneys who were involved with prisoner civil rights litigation and attorneys for the four states to submit briefs on the issue of whether the new administrative exhaustion provision applies to these pending cases.[4]

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the exhaustion requirement. Appellant's Br. In No. 95-6451 at 13. In light of our holding in this case, we need not address this argument. It is clear, however, that in the usual case in the future, where the alleged violations occurred after the PLRA's enactment, and inmates have both notice that exhaustion is required and a reasonable opportunity to file complaints, it would be contrary to Congress's intent in enacting the PLRA to allow inmates to bypass the exhaustion requirement by declining to file administrative complaints and then claiming that administrative remedies are time-barred and thus not then available.

[4]The briefing letter stated the question as follows: "In the absence of an expressed affective date, does this legislation [the amendment to 42 U.S.C. 1997e(a)] apply retroactively to litigation pending at the date of its enactment, April. 26, 1996." The clerk also asked the attorneys to discuss whether the new law requires prisoners to appeal in state court a denial of administrative

II. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction over these § 1983 cases under 28 U.S.C. §§ 1331, 1291. We examine de novo the purely legal questions of whether a new statute applies to pending cases.[5] *Lyons*, 105 F.3d at 1065-66.

III. DISCUSSION

Before this year, prisoners challenging the conditions of their confinement under 42 U.S.C. § 1983 were not, as a rule, required to exhaust administrative remedies before filing suit. Although 42 U.S.C. § 1997e allowed district courts to "continue such case[s] for a period of not to exceed 180 days in order to require exhaustion of such plain, speedy, and affective administrative remedies as are available," exhaustion was only to be required "if the court believe[d] that such a requirement would be appropriate and in the interests of justice." 42 U.S.C. § 1997e(a)(1) (1995). *See Patsy v. Board of Regents*, 457 U.S. 496, 502-07 (1982) (discussing § 1983); *id.* At 508-12 (discussing § 1997e). The PLRA, however, amended § 1997e to require that prisoners seeking to bring such claims first exhaust any available administrative remedies. 42 U.S.C. § 1997e(a). The question before us is whether this new requirement should be applied to cases which were filed, dismissed by the district courts, and appealed to this court before the PLRA was signed into law.

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remedies. Because we hold that the exhaustion requirement does not apply to these cases we need not reach this second issue.

[5]Because Congress did not enact the PLRA until after these cases were pending in this court, the district court had no opportunity even to address the question.

The Supreme Court has determined that, in deciding whether a new statute should be applied to pending cases,

> the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive affect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, ... it does not govern absent clear congressional intent favoring such a result.

Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994). Accordingly, we "first look to the statute's text for an expression that the [Act] should, or should not, apply to pending cases." *Lyons*, 105 F.3d at 1065.

A. Textual Analysis

The PLRA amended 42 U.S.C. § 1997e to read, '[n]o action ***shall be brought*** with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (emphasis added). We believe that Congress, by its use of the highlighted language, "has expressly prescribed the statute's proper reach." *Landgraf*, 511 U.S. at 280. The statute expressly governs the bringing of new actions, not the disposition of pending cases.

Actions brought before the statute was enacted are not affected by the new administrative exhaustion requirements.

The Seventh Circuit has used similar reasoning to find that another provision of the PLRA does not apply to pending cases. In *Abdul-Wadood v. Nathan*, 91 F.3d 1023 (7th Cir. 1996), that court had to decide whether a case filed before the PLRA's enactment could be dismissed under the new 28 U.S.C. § 1915(g), which states that "[i]n no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if" he has brought three previous frivolous actions or appeals. 28 U.S.C. § 1915(g) (1996). Judge Easterbrook held for the court that the case should not be dismissed because "[s]ection 1915(g) governs bringing new actions or filing new appeals...rather than the disposition of existing cases." 91 F.3d at 1025. Similarly, because § 1997e(a) governs only the bringing of actions, it does not affect pending cases.

Section 802 of the PLRA, which delineates the courts' authority to order prospective relief with respect to prison conditions, lends some additional support to this textual analysis. This section specifically states that the amendment in that section to 18 U.S.C. § 3626 "shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title." PLRA § 802(b)(1). Plaintiffs argue *expressio unius est exclusio alterius*: that because Congress specified that one part of the PLRA applies to pending actions, it must have intended that the rest of the Act does not. Such an argument would usually not be dispositive by itself. *See Landgraf*, 511 U.S. at 259; *Lyons*, 105 F.3d at 1067. Here, however, the text of the new requirement plainly states that "[n]o action shall be brought" without exhaustion of administrative remedies. Thus, it is likely that had Congress intended the new requirement to pertain to

pending cases it would have employed the same language as it used in § 802(b)(1) to make that intent clear. This strengthens our conclusion that the text of the PLRA indicates that the new administrative exhaustion requirement applies only to cases filed after the Act's passage.

B. Impermissible Retroactive Affect

Even if the language of the statute did not mandate that administrative exhaustion be required only in actions brought after the affective date of the Act, the Supreme Court's decision in *Landgraf* would do so. Footnote 29 of the Court's opinion controlling:

> A new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime, and the promulgation of a new rule would not require an appellate remand for a new trial.

Landgraf, 511 U.S. at 275 n.29. Although the states suggest that this language could refer only to changes to the technical requirements of filing a complaint, and that the footnote is thus distinguishable from the cases at bar, we will not give the opinion such a narrow reading. The new exhaustion requirement concerns the bringing of actions and, under *Landgraf*, does not affect cases brought before the Act's passage.[6]

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[6]There are other indications, too, in *Landgraf* that a procedural change enacted while a case is pending does not require that steps taken before the enactment be retaken. For example, although "[t]he jury trial right set out in § 102(c)(1) [of the 1991 Civil Rights Act] is plainly a procedural change of the sort that would ordinarily govern in trials conducted after its affective date," "the

The states argue that because footnote 29 is dictum it is not binding on this court. *Cf. Covino v. Reopel*, 89 F.3d 105, 108 (2d Cir. 1996) (dismissing footnote 29 as distinguishable dictum). We believe this footnote is instructive of the Supreme Court's views and cannot be dismissed out of hand. If anything, this particular "dictum," which eight Justices endorsed, carries more weight than much of the *Landgraf* analysis, which commanded a bare majority. *See Landgraf*, 511 U.S. at 290-92 (Scalia, J., concurring in judgment). Where there is no clear precedent to the contrary, we will not simply ignore the Court's dicta. *See Jordan v. Gilligan*, 500 F.2d 701, 707 (6th Cir. 1974) ("Even the [Supreme] Court's dicta is of persuasive precedential value.").

The states argue that there is, in fact, contrary Supreme Court precedent: *Cort v. Ash*, 422 U.S. 66 (1975), in which the plaintiff sought to enjoin a corporation from including partisan political literature with its dividend checks, and *Weinberger v. Salfi*, 422 U.S. 749 (1975), which involved a challenge to Social Security eligibility requirements. Neither case is apposite. *Cort* involved two of the situations, inapplicable here, in which, under *Landgraf*, a court should "apply the law in affect at the time it renders its decision." *Landgraf*, 511 U.S. at 273 (quoting *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711

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promulgation of a new jury trial rule would ordinarily not warrant retrial of cases that had previously been tried to a judge." *Landgraf*, 511 U.S. at 280, 281 n.34. *See* NORMAN J. SINGER, 2 SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 41.04 at p. 351 (5th ed. 1992) ("It has been held that there is a presumption that procedural statutes apply retroactively. But steps already taken, including pleadings, and all things done under the old law continue affective, unless an intent to the contrary is plainly manifested.") (footnote omitted).

(1974)). First, *Cort* differs from the cases at bar in that Ash was seeking to enjoin the defendants from future misconduct. *Cort*, 422 U.S. at 71, 74. "*In that circumstance*, a statute enacted after the decision of the Court of Appeals requires reversal of the holding of the Court of Appeals." *Id.* at 74. (citation omitted) (emphasis added). *See id.* at 77 ("[N]or is there any possible 'manifest injustice' in requiring respondent to pursue *with respect to alleged violations which have yet to occur* the statutory remedy for *injunctive relief* created by the [intervening] Amendments.") (emphasis added). Under *Landgraf*, applying a new statute to pending cases is proper where plaintiff seeks only future injunctive relief. *Landgraf*, 511 U.S. at 273-74.[7]

Second, the intervening statute[8] in *Cort* "expressly vest[ed] the [Election] Commission with 'primary jurisdiction' over any claimed violation of [the relevant election law] within its purview." *Cort*, 422 U.S. at 75-76. Under *Landgraf*, "intervening statutes conferring or ousting

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[7]The dissent's attempt to bring the cases at bar within the holding of *Cort* on the grounds that any relief granted will necessarily take place in the future is meaningless: because we cannot reverse time, of course any award of damages will occur in the future, just as it would have in *Landgraf*. Under the dissent's theory, a court could punish someone for conduct that was made criminal only after he had done it, because the punishment would take place in the future.

[8]The new statute established the Federal Election Commission to "administer, seek to obtain compliance with, and formulate policy with respect to [the] Act and [related sections of the criminal code]. The Commission has primary jurisdiction with respect to the civil enforcement of such provisions." Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, 1280-81 (codified at 2 U.S.C. § 437c(a)(1), (b) (1975)).

jurisdiction" will regularly be applied to pending cases because "jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties,'" *Landgraf*, 511 U.S. at 274 (quoting *Republic Nat. Bank of Miami v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)). *See Lyons*, 105 F.3d at 1075. The statute in *Cort* contained a specific grant of jurisdiction to the Commission which, the Court held, served at the same time to divest the federal courts of jurisdiction over such cases. *Cort*, 422 U.S. at 75-76 & n.9. Section 1997e(a), in contrast, addresses a party's right to bring suit in court and does not speak in terms of jurisdiction or the power of the court: it is merely an exhaustion requirement. *See Castille v. Peoples*, 489 U.S. 346, 349 (1989) ('Codified since 1948 in 28 U.S.C. § 2254, [9] the [habeas corpus] exhaustion rule, while *not a jurisdictional requirement*, creates a 'strong presumption in favor of requiring the prisoner to pursue his available state remedies.'") (citing 28 U.S.C. § 2254 and quoting *Granberry v. Greer*, 481 U.S. 129, 131 (1987)) (emphasis added); *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) ("The doctrine of exhaustion of administrative remedies is one among related doctrines--including abstention, finality, and ripeness--that govern the *timing* of

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[9]28 U.S.C. § 2254(b) (1989) stated:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless is appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

federal court decision making.") (emphasis added).[10]

Cort, then, does not suggest that the exhaustion requirement should apply to these pending cases. *Landgraf* specifically cites *Cort* as involving "application of [an] intervening statute transferring to [an] administrative agency *jurisdiction* over [a] *claim for injunctive relief.*" *Landgraf*, 511 U.S. at 279 n.33. In the cases before us, where plaintiffs seek monetary damages and the intervening statute does not purport to oust district court jurisdiction, *Cort* is inapposite.

The states next argue that the new administrative exhaustion requirement is jurisdictional under *Weinberger v. Salfi*, 422 U.S. 749 (1975), and should thus govern pending cases.[11] The essence of their argument is that *Salfi* held that a statute that involved agency exhaustion and contained seemingly prospective language was jurisdictional, and therefore that § 1997e(a) must also be jurisdictional. The *Salfi* opinion makes plain, however, the difference between the statute involved there and the one now before us. In *Salfi*, the Court held that it was clear that the relevant statute[12] was "more than a codified requirement of

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[10]We need not decide whether these statements in *Peoples* and *McCarthy* mean that district courts can exercise jurisdiction over unexhausted prisoners' claims filed after the PLRA's enactment. We hold only that the new administrative exhaustion requirement of § 1997e does not oust preexisting jurisdiction.

[11]*Salfi* did not involve any question of whether an interceding statute should apply to pending cases.

[12]The Court quotes the statute, 42 U.S.C. § 405(h) (1974), in relevant part: "No action against the United States, the Secretary, or any officer of employee thereof shall be brought under [§ 1331 *et seq.*] of Title 28 to recover on any claim arising under [Title II

administrative exhaustion" on the grounds that the statute's "own language" was "sweeping and direct and [ ] state[d] that no action shall be brought under [28 U.S.C.] § 1331, not merely that only those actions shall be brought in which administrative remedies have been exhausted." *Salfi*, 422 U.S. at 757. *See id.* at 756-57 (On its face, this provision bars district court federal-question jurisdiction over suits, such as this one, which seek to recover Social Security benefits. Yet it was § 1331 jurisdiction which appellees successfully invoked in the District Court.") Section 1997e(a), in contrast, contains neither the sweeping and direct language of § 405(h) nor that statute's explicit bar to district court jurisdiction. It, rather, indicates "merely that only those actions shall be brought in which administrative remedies have been exhausted." *Salfi*, 422 U.S. at 757.

Because neither *Cort* nor *Salfi* requires a contrary result, we believe that even if the prospective statutory language were not dispositive in this case, footnote 29 of *Landgraf* would require that the new administrative exhaustion provision not apply to pending cases.[13]

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of the Social Security Act]." *Salfi*, 422 U.S. at 756 (alterations in original).

[13]There is certainly nothing in the text of the PLRA to indicate "clear congressional intent" that the administrative exhaustion requirement should be given retroactive affect. *See Landgraf*, 511 U.S. at 280.

The dissent's reliance on a short quote from Chief Justice Marshall's opinion in *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), therefore seems particularly strange. The new law at issue in that case (a treaty) explicitly applied to property that was not "definitively condemned" when the treaty was signed, *id.* at 108; the holding rested on that language, rather than on any broad principle of applying intervening laws. *See id.*

C. Policy Considerations

The states and the plaintiffs argue at great length that applying, or refusing to apply, respectively, this new provision to pending cases would be good policy or would better serve the purposes of the new law. Such considerations do not figure in the *Landgraf* analysis. *See Landgraf*, 511 U.S. at 285-86 ("it will frequently be true...that retroactive application of a new statute would vindicate its purposes more fully. That consideration, however, is not sufficient to rebut the presumption against retroactivity... A legislator who supported a prospective statute might reasonably oppose retroactive application of the same statute."). Moreover, it is not at all clear in this case which side has the better of the policy argument.

The Supreme Court has called "protecting administrative agency authority and promoting judicial efficiency" the "twin purposes" of exhaustion requirements. *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992). Sending these plaintiffs back to exhaust their administrative remedies would, of course, lighten this court's docket, at least temporarily.[14] *See id.* (judicial efficiency includes avoiding unnecessary judicial controversy and piecemeal appeals). However, "policy considerations alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with congressional intent." *Patsy v. Board of Regents*, 457

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at 110. *See also Landgraf*, 511 U.S. at 273 ("Our application of 'the law in affect' at the time of our decision in *Schooner Peggy* was simply a response to the language of the statute.").

[14]We might, however, find some of these cases before this court again in another two years, after plaintiffs have exhausted their administrative remedies and then gone through district court for a second time.

U.S. 496, 513 (1982). Because Congress did not intend that all prisoners who filed suit before the act took affect be required to exhaust administrative remedies, we could not impose such a requirement even if we though it wise policy.

In addition, although administrative exhaustion in the usual case "may produce a useful record for subsequent judicial consideration," *McCarthy*, 503 U.S. at 145, the facts in these cases are already stale. Administrative findings might still be useful to a reviewing court, but administrative fact finding in these old cases would not have the same promptness advantage over judicial fact finding that would exist where the administrative procedure occurred soon after the alleged violation.

Other policy considerations counsel against applying the new exhaustion requirement to pending cases. The sheer volume of prisoner civil rights cases makes it difficult for the federal courts to take the time that is often necessary to distinguish between the frivolous and the meritorious suits. That inmates are forced to file nearly all of these cases pro se, and can rarely conduct any sort of factual investigation, only compounds this problem. To the extent, then, that applying the new administrative exhaustion requirement to pending cases would allow the courts more time to examine the merits of each case, or would provide a way to separate the meritorious from the meritless cases, to do so would be good policy. Conversely, we would hesitate to do this if we thought it would aggravate these problems.

The majority of the prisoner's rights cases pending before this court were dismissed below; if past experience is any indication, to dismiss the cases and allow the prisoners to refile after they have exhausted their administrative remedies, or to retain jurisdiction over the cases while the inmates exhaust those remedies, will not reduce the district

courts' dockets or workloads. To the contrary, the district courts would then have to reexamine these same cases, supplemented with new records from the administrative proceedings, sometime in the future. Although a district court that had erroneously previously dismissed a particular case might conceivably make a different determination based on the new administrative record, if an inmate had thought that going through the administrative process would help his case, he could have filed an administrative complaint in the first place under the old law. And if the district court had thought that administrative consideration would have been "appropriate and in the interests of justice," and that the available grievance procedure was "fair and affective," the district judge could have continued the case for up to 180 days and ordered administrative exhaustion in the first place. 42 U.S.C. § 1997e(a) (1995).[15] Furthermore, there is no indication that any plaintiffs with pending cases want to be required, or even allowed, to go back and exhaust state administrative procedures. In this regard, then, we believe it is better policy to apply the old law to these pending cases and address them now, rather than recycling them through the system and perhaps perpetuating the problems that the old law engendered. We emphasize that we do not believe that it is our job to weigh policy--that is Congress's job. We address these policy arguments simply because the parties spent so much time doing so.

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[15]The pre-PLRA § 1997e(a) places no temporal restrictions on a district court's authority to order this exhaustion. The dissent's suggestion that our decision today somehow denies district courts the benefits of an administrative record is therefore somewhat mysterious: any district court that believes that such a record would be useful in a case governed by the old law may require administrative exhaustion.

In the end, even if it were proper for us to use policy arguments to supersede congressional intent and apply the new law to these pending cases, it is unclear which outcome is the better policy.

Sending these cases back for administrative exhaustion would also cause unnecessary jurisprudential questions in the future. The events giving rise to these cases occurred several years ago; in some, the statute of limitations has expired. Although all four of the states' representatives stated at oral argument that they would waive any applicable time limits on filing administrative claims, none of the assistant attorneys general present could assure us that they had the authority to extend the applicable statutes of limitations. Were we to apply the new law to these cases, it is not completely certain that we could toll the statutes of limitations. *Compare Board of Regents v. Tomanio*, 446 U.S. 478, 490-91 (1980) ("Unless [a federal remedy] is structured to require previous resort to state proceedings, so that the claim may not even be maintained in federal court unless such resort be had, it cannot be assumed that Congress wishes to hold open the independent federal remedy during any period of time necessary to pursue alternative state-court remedies.") (citation omitted), *with Patsy*, 457 U.S. at 514 n.17 ("Unless the doctrine that statutes of limitations are not tolled pending exhaustion were overruled, *see* [*Tomanio*], a judicially imposed exhaustion requirement might result in the affective repeal of § 1983."). Finally, the states have not pointed to anything to distinguish the cases before us, where the inmates lost at the district court level, from cases pending in this court in which the plaintiffs were victorious below. Requiring successful plaintiffs to relitigate their grievances would have impermissible retroactive affect under *Landgraf*. *See Landgraf*, 511 U.S. at 280 (statute will have retroactive affect if it "impose[s] new duties with respect to transactions already completed"). It may well be that the courts could

develop doctrines and remedies to solve these potential problems. However, we should not invite unnecessary problems upon the courts and simply hope that we might be able to remedy them in the future.[16]

These considerations lend further support to our conclusion: where the language of the statute and *Landgraf* both require that we apply this new requirement only with respect to cases filed after the PLRA's passage, it would be improper to hold, on policy grounds, that the provision applies to the cases before us. *Cf. Patsy*, 457 U.S. at 514 ("These and similar questions might be answered swiftly and surely by legislation, but would create costly, remedy-delaying, and court-burdening litigation if answered incrementally by the judiciary in the context of diverse constitutional claims relating to thousands of different state agencies.").

IV. CONCLUSION

Because the language of 42 U.S.C. § 1997e(a) is explicitly prospective and there is no reason to think that Congress intended a retroactive affect, we will not apply the new administrative exhaustion requirement to these cases where appeals were pending in this court on April 26, 1996, the day PLRA was enacted. These four cases are properly before this court, and can be decided without undertaking

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[16]Congress passed the PLRA in large part to change the manner in which the federal courts handle prison civil rights actions. Had Congress intended that the Act have the drastic affect of throwing out of court litigants with pending appeals, and of requiring that federal courts toll state statutes of limitations so that pending cases can be held in abeyance or refiled after administrative exhaustion, surely it would have given some indication of this intent.

administrative exhaustion. We address the merits of these four cases in separate opinions.

MERRITT, Circuit Judge, dissenting. Does the new "prisoner civil rights" statute, the Prison Litigation Reform Act of 1996, 42 U.S.C. § 1997e, apply to pending cases? That is the question before us. Passed in April 1996, the statute is jurisdictional in nature. It requires the exhaustion of all "available" state "administrative remedies" by the prisoner before a federal court may entertain and decide his civil rights action. Prior to the enactment of the new statute, no significant incentives existed to deter the filing of state prison petitions raising insubstantial issues, and so in federal courts each year prisoners file thousands of petitions and take thousands of appeals. More than 1,000 such appeals are filed in the Sixth Circuit Court of Appeals each year, and approximately 500 are now pending.

The opinion of the Court that the statute does not apply to pending cases fails even to mention the extensive benefits of the new statute or to acknowledge that those benefits apply just as much to pending cases as to new cases. This narrow interpretation of what could be an extremely useful law deprives prisoners, state corrections systems, state prosecutors and courts of an opportunity to overcome some of the problems with prisoner petitions now flooding the federal courts--almost all of which are denied without a hearing in the trial or appellate courts.

A system deferring federal court review until completion of the state process of administrative adjudication and judicial review of the administrative decision (if provided by state law) has long been needed. No persuasive reason has ever been given for requiring full exhaustion of state remedies in habeas corpus cases involving life or liberty but allowing direct access in prison rights cases under § 1983.

The new statute is therefore, a much needed reform with substantial benefits.

The reasons for requiring exhaustion in such cases are similar to the reasons for requiring exhaustion of available remedies in state habeas corpus cases involving good-time credits and similar prison regulations, as explained by Justice Stewart in *Preiser v. Rodriguez*, 411 U.S. 475, 491-92, 498 (1973). "It is difficult to imagine," he wrote, "an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, that the administration of its prisons":

> The relationship of State prisoners and the State officers who supervise their confinement is far more intimate than that of a state and a private citizen...Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems. Moreover, because most potential litigation involving state prisoners arises on a day to day basis, it is most efficiently and properly handled by the state administrative bodies and state courts, which are, for the most part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with those grievances.
>
> ...
>
> [The exhaustion requirement] services the important function of allowing the State to deal with these peculiarly local problems on its own while preserving for the state prisoner

> an expeditious federal forum for the vindication of his federally protected rights, it the State has denied redress.

Each of the four states in the Sixth Circuit, Tennessee, Kentucky, Ohio and Michigan, has recently established a prison grievance process for resolving disputes that is certified by the Department of Justice as meeting its criteria for a rational, fair and efficient system of conducting evidentiary hearings and deciding prison disputes. Such deliberative proceedings, based on evidence, a written record and concluding in a written decision subject to review, will give prison wardens, state correction officials, state executive, judicial and legislative leaders, and the public much needed information about the operation of the prison system. The prisoner will have an opportunity to complain, present evidence personally and have others testify before a neutral tribunal familiar with local prison conditions. Legitimate grievances can be worked out and adjusted at the local administrative and review level before coming to federal court, as currently takes place in criminal cases during the habeas corpus process.

This weeding-out process will tend to reduce the number of such cases that reach the federal courts, as in habeas cases, and improve the quality of the decision making process. The federal courts will have a written record. They will be able to determine whether a constitutional violation has occurred in a more reflective and reliable way without the present bureaucratic necessity of delegating the work in plenary fashion to pro se law clerks at the district court level and to staff attorneys at the appellate level.

In the *Thaddeus-X* case alone, Judge Moore's opinion on the merits of the summary judgment issue runs to 12,000 words and interprets nearly 100 different court opinions and

orders a new trial in the court below that will require many days, perhaps weeks, of evidence from inmates and prison employees. *Thaddeus-X*, by itself, illustrates the reasons we should require administrative exhaustion and an administrative record before deciding the multiple, confusing, shotgun-type claims filed against the many state defendants in the case.

My colleagues' opinion avoids any serious consideration of beneficial purposes of the new statute or the policies underlying it. "We emphasize," Judge Moore says, "that we do not believe that it is our job to weight policy--that is Congress's job." The opinion simply repeats several times in different ways the view that the pending cases will simply come back "before this court again in another two years, after plaintiffs have exhausted their administrative remedies and then gone through the district court for a second time." As a district judge, I would prefer a few cases coming back with an administrative record to the *Thaddeus-X* type result.

Ironically, this prediction that all of the cases will come back in two years is inconsistent with Judge Moore's stated view that the statute of limitations will probably have run when the cases come back to court. The purpose of the new statute is simply to defer a decision pending exhaustion of remedies, and the running of the statute of limitations would be tolled or suspended during the period of exhaustion, as is uniformly the case in all such administrative cases. This is not a valid argument against applying the new jurisdictional statute to pending cases.

Judge Moore's opinion on the issue of applying the statute to pending cases consists mainly of citing short excerpts from selected Supreme Court opinions to reach the chosen result--a familiar exercise in contemporary legal

argumentation. The opinion ignores the broad purposes of the new statute and the fact that Congress, in employing the doctrine of exhaustion of remedies, has decided to use the habeas corpus model of exhaustion. Even if we use this limited rationale, however, a different conclusion is required. This rationale does not give the language of the new statute and the Supreme Court authorities their most plausible interpretation.

First, the statutory language, "no action shall be brought" until all available remedies are "exhausted," should be interpreted to mean what is obviously intended--that a federal court should not "decide" the merits of any such action prematurely. Contrary to the interpretation given by Judge Moore, it is obvious that Congress did not literally mean to bar a prisoner from "filing" a complaint in court. The only interpretation of the language that makes sense is that a federal court will not adjudicate the claim until after exhaustion. That is the purpose of the statute--nonadjudication of unexhausted claims--and it logically applies just as much to pending cases as to any other cases. The activity that the new statute contemplates should now occur--state adjudication of the claim--has not taken place in these cases, and the Court should not now adjudicate either a new or pending case without it.

Second, the language in *Landgraf v. USI Film*, 511 U.S. 244 (1994) and *Court v. Ash*, 422 U.S. 66 (1975), that Judge Moore cites to reach the chosen result actually supports the opposite conclusion. In the *Court* case, Congress had recently enacted a new statute setting up the Federal Election Commission and creating for the first time a set of election law administrative remedies. In 1972, plaintiff had filed an action for damages and injunctive relief against Bethlehem Steel and its officials for making illegal corporate contributions to a presidential campaign, and the

Court of Appeals had upheld the plaintiff's claim. The new exhaustion of remedies law was enacted after the Court of Appeals ruling. Justice Brennan, writing for a unanimous court, held that the exhaustion of remedies provision of the new statute must be applied to pending cases where the relief, if any, will take place in the future. In the cases now before us, as in *Court*, no relief has been granted and all relief, if any should be granted in either a judicial or prison administrative proceeding, must take place in the future. *Court* is specifically cited with approval in footnote 33 of *Landgraf v. USI Films*, and our Court should have followed its holding in the instant case.

Third, in quoting snippets of Supreme Court language, the lead opinion fails to recognize the significance of language from *Landgraf* relying on Chief Justice Marshall's opinion in *United States v. Schooner Peggy*, 5 U.S. 64 (1 Cranch 103) (1801). For almost two centuries, the Supreme Court observes, "we have recognized that, in may situations, a court should 'apply the law in affect at the time it renders its decisions...even though the law was enacted after the events that gave rise to the suit.'" The Supreme Court then gives as example of this doctrine a number of cases holding that intervening statutes modifying jurisdiction should be applied to pending cases because "application of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case'" (case citation omitted). In the instant case, our Court fails to recognize that the new statute now before us simply modifies our jurisdiction in § 1983 prisoner cases by requiring exhaustion of remedies. In *Landgraf*, the Supreme Court also says changes in procedural rules usually apply to pending cases "because rules of procedure regulate secondary rather than primary conduct." In the instant case the Court again fails to recognize that this new statute changes no "primary" or substantive right but only

"secondary" rights governing the tribunal that will first conduct a hearing, make a record and resolve the dispute.

My conclusion is therefore that the purpose and policy underlying the new statute providing for exhaustion of state administrative remedies in prisoner 1983 cases leads to the application of the new statute to pending cases and that the case law since Chief Justice Marshall's time leads to the same conclusion. Applying the new statute to pending cases will not upset settled expectations or vested rights of any kind. All legitimate interests are served by such a rule--the prisoner with a valid grievance, the states which have created a fair process for adjudicating such claims and the federal courts which are now assigning such cases to pro se law clerks and staff attorneys because we are unable to cope with the volume of such cases or treat them in the same way that we treat regular federal question and diversity cases. The rule created by my colleagues declining to apply a current jurisdictional statute to pending cases is not sensible because it does not serve the interest of any party or the public and does not observe the longstanding values of federalism requiring a due respect for state institutional arrangements. And it certainly does not serve the cause of judicial economy. For these reasons, I do not believe we should exercise jurisdiction in these cases but should remand with instructions to dismiss without prejudice so that the parties can exhaust their administrative remedies under the Prison Litigation Reform Act of 1996.

Supreme Court, U.S.
FILED
JUN 16 1997
OFFICE OF THE CLERK

(2)

No. 96-1811

In the

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October Term, 1996

TERRY L. MORRIS, *et al.*,

Petitioners,

v.

JOHN L. WRIGHT, *et al.*,

Respondents.

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BRIEF OF THE STATES OF MARYLAND, ALASKA, ARIZONA, DELAWARE, FLORIDA, HAWAII, INDIANA, LOUISIANA, MISSOURI, MONTANA, NEVADA, NEW JERSEY, NORTH CAROLINA, OKLAHOMA, PENNSYLVANIA, SOUTH DAKOTA, VIRGINIA, WASHINGTON, AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the administrative remedy exhaustion requirement of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), apply to cases pending on the date of its enactment when it does not attach new legal consequences to completed transactions and does not upset settled expectations or vested rights?

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Pursuant to Sup. Ct. R. 37, the signatory States submit this brief as *amici curiae* in support of petitioner.

INTEREST OF *AMICI CURIAE* AND INTRODUCTORY STATEMENT

The States have a strong interest in the important questions that this case presents for two reasons. First, applying the administrative exhaustion requirement of the

Prison Litigation Reform Act ("PLRA" or the "Act") to cases pending on the date of its enactment provides the States with the initial opportunity to address innumerable complaints regarding prison conditions. The exercise of that opportunity will significantly increase the likelihood that many prisoner claims will be resolved through the administrative process by screening out the frivolous and truly legitimate claims, thereby resulting in the elimination of a substantial number of federal actions.

Second, this case is likely to affect the largest category of civil suits in the federal judicial system -- prisoner civil rights actions -- because the pertinent language of the PLRA's administrative exhaustion provision is substantially similar to that contained in several other provisions of the same Act. Those provisions collectively facilitate the States' operation of their prison systems by curbing the flood of baseless inmate litigation clogging the courts and reducing the unnecessary expenditure of tremendous resources wasted on such litigation.

In short, the States are interested in this case because its resolution will have a dramatic impact on the States' core governmental function of overall prison management due to the effect it will have on a great number of actions in which the States are involved. The proper application of the PLRA's administrative exhaustion requirement, therefore, needs to be clarified, particularly because of sharp conflicts between the decision below and decisions of this Court and other federal courts of appeals. In holding that the administrative exhaustion requirement set forth in 42 U.S.C. § 1997e(a), as amended by the PLRA, is limited only to cases commenced after April 26, 1996, the court of appeals applied an unduly restrictive interpretation of the statutory language "[n]o action shall be brought," and reached a decision that cannot be reconciled with either this Court's statutory retroactivity analysis enunciated in *Landgraf v.*

USI Film Products, 114 S.Ct. 1483 (1994), or decisions of other federal appellate courts construing substantially similar language in other provisions of the PLRA. As a result, the lower court's decision sweeps aside fundamental principles of federalism and imposes severe financial and administrative burdens on the States' correctional and legal systems as well as the federal judiciary.

The sheer volume of meritless prisoner lawsuits imposes substantial and unique burdens on State correctional systems in two significant ways: (1) by diverting prison staff from their core function of maintaining the safety and security of their institutions, and (2) by wasting scarce resources that could be used for other, more constructive purposes such as improving prison conditions and training prison personnel. *See* Robert G. Doumar, *Prisoner Cases: Feeding the Monster in the Judicial Closet*, 14 ST. LOUIS U. PUB. L. REV. 21, 36-37 (1994). The resulting fiscal impact is enormous: the National Association of Attorneys General recently estimated that inmate civil rights suits cost the States at least $81.3 million per year, the vast majority of which is attributable to non-meritorious cases. *See* Letter from Inmate Litigation Task Force of the National Association of Attorneys General to Senator Robert Dole (Sept. 19, 1995), 141 Cong. Rec. S14,417-14,418 (daily ed. Sept. 27, 1995).

The flood of meritless prisoner lawsuits also has a third deleterious effect of undermining prison authority by giving prisoners the impression that they can file a lawsuit to "get back" at the system which imprisoned them and that this ability to sue is on a par with society's authority to incarcerate them. *See* Kathleen Engel & Stanley Rothman, *The Paradox of Prison Reform: Rehabilitation, Prisoners' Rights, and Violence*, 7 HARV. J.L. & PUB. POL'Y 413, 431-33 (1984). This "message of moral equivalence" undercuts a fundamental purpose of incarceration: "that individuals

who have committed serious crimes are the legitimate objects of society's reproof and punishment." *Senate Judiciary Committee Hearing on Prison Reform: Enhancing the Effectiveness of Incarceration*, 141st Cong., 2d Sess. (July 27, 1995) (statement of Sen. Abraham). *See also* Engel & Rothman, 7 HARV. J.L. & PUB. POL'Y at 431-33.

The serious problems caused by frivolous prisoner litigation affect every jurisdiction in the country, not just the four petitioner States in this case. That litigation imposes severe burdens on the federal judicial system by the "squandering [of] judicial resources with little offsetting benefit to anyone." *Sandin v. Conner*, 115 S.Ct. 2293, 2299 (1995). From September 1995 to September 1996, for example, prisoners commenced almost 8,700 appeals in federal civil rights actions, comprising 24% of all civil appeals in the U.S. courts of appeals. *See* Administrative Office of the United States Courts, *Judicial Business of the United States Courts* 88-89, Table B-1A (1996). In the twelve-month period ending June 1996, prisoners filed more than 43,000 civil rights actions in the federal district courts, comprising 15.8% of all civil actions in those courts. *See* Administrative Office of the United States Courts, *Statistical Tables for the Federal Judiciary* 28, Table C-2 (1996). This volume of prisoner petitions adversely affects the ability of the federal courts to identify and administer meritorious prisoner cases properly and detracts from the courts' ability to devote their attention to other cases. *See* 141 Cong. Rec. S14,413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole) (frivolous prisoner lawsuits negatively "affect the quality of justice enjoyed by law-abiding citizens"); Doumar, 14 ST. LOUIS U. PUB. L. REV. at 29-30, 36.

The States have an important interest in the outcome of this case, therefore, because many pending prisoner lawsuits

were filed before April 26, 1996 and will be affected by a decision that extends the PLRA to cases pending on the date it was enacted. Certiorari is warranted to resolve the conflicts between the decision below and decisions of this Court and other federal appellate courts, and to establish the proper application of the administrative exhaustion requirement of the PLRA.

REASONS FOR GRANTING REVIEW

I. THE DECISION BELOW CONFLICTS WITH *LANDGRAF V. USI FILM PRODUCTS*, 114 S.Ct. 1483 (1994), AND OTHER DECISIONS OF THIS COURT.

Relying on a footnote from this Court's decision in *Landgraf*, the court of appeals held that it would be impermissibly retroactive to apply the PLRA's administrative exhaustion requirement to prisoners whose claims were filed before April 26, 1996, as those claims were already properly filed under the old law. (App. A-8) (citing 114 S.Ct. at 1502 n.29). The lower court's decision conflicts with this Court's statutory retroactivity analysis enunciated in *Landgraf*, with this Court's decisions emphasizing the importance of the States' interest in managing their prisons and in having the initial opportunity to correct errors made in administering their correctional systems, and with Congress's primary purpose in enacting the PLRA.

As this Court has recognized, a statute does not operate retroactively merely because it applies to conduct antedating the statute or reduces the possibility of prevailing in a pending case. *Landgraf*, 114 S.Ct. at 1499. "Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* A statute will have retroactive effect if "it would impair rights a party possessed when he acted,

increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 1505. A determination that a particular rule operates "retroactively" depends upon the nature and extent of both the change in the law and the connection between the operation of the new rule and a relevant prior event. *Id.* at 1499.

Changes in jurisdictional rules are not considered to have retroactive effect and are properly applied to pending suits because a jurisdictional statute goes to the power of the court rather than to the rights of the parties. *Id.* at 1501-02. The application of a new jurisdictional rule is not considered to take away any substantive right, "but simply changes the tribunal that is to hear the case." *Id.* at 1502 (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)). Similarly, changes in procedural rules may also be properly applied to pre-existing suits without raising retroactivity concerns because those rules regulate only secondary rather than primary conduct. *Id.*

A requirement that a prisoner exhaust administrative remedies before filing a civil rights action in federal court is a procedural or jurisdictional rule that does not have an impermissibly retroactive effect. Indeed, administrative exhaustion requirements have at times been characterized as essentially procedural in nature because they prescribe the basic scheme under which a claim may be heard in federal court, *see Darby v. Cisneros*, 113 S.Ct. 2539, 2543-48 (1993); *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992), and at other times have been considered to be effectively jurisdictional. *See Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 137 (1981) (Brennan, J., concurring) (observing that a "requirement of exhaustion of state administrative remedies was certainly a mandatory precondition to suit, and in that sense a 'jurisdictional prerequisite'"). *See also* Petition at 15 (citing cases for the

proposition that the exhaustion requirement under the Federal Tort Claims Act is jurisdictional). In either event, requiring a prisoner to pursue administrative remedies prior to filing suit in federal court attaches no new legal consequences to events completed before the PLRA's enactment, impairs no rights, and imposes no new duties with respect to completed transactions.

Nor does the requirement that a prisoner exhaust administrative remedies affect the merits of the prisoner's underlying claim or deny access to the courts. Rather, as the dissenting judge below recognized, "[t]he purpose of the new statute is simply to defer a decision pending exhaustion of remedies" (App. A-22), and "this new statute changes no 'primary' or substantive right but only 'secondary' rights governing the tribunal that will first conduct a hearing, make a record and resolve the dispute." (App. A-24-A-25). The statute simply gives the States the initial opportunity to address, and possibly resolve in a manner satisfactory to all parties, grievances concerning prison conditions.

Moreover, the PLRA's exhaustion requirement does not upset any settled expectations or vested rights, as a court could have required a prisoner to exhaust administrative remedies prior to the PLRA. *See* 42 U.S.C. § 1997e(a) (1995) ("[T]he court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed 180 days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.").[1]

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[1] Under former § 1997e(a), exhaustion could not be required unless the U.S. Attorney General had certified or a court had determined that the State's administrative scheme substantially complied with certain minimum acceptable standards of fairness. As of July 8, 1996, the U.S. Department of Justice had certified

(continued...)

Thus, § 1997e(a) does not raise any retroactivity concerns under *Landgraf* because a prisoner never had an absolute right to avoid pursuing available administrative remedies.

The court of appeals concluded, however, that § 1997e(a) does not concern the court's jurisdiction or power; rather, "it is merely an exhaustion requirement." (App. A-11). As a result of that conclusion, the court accorded no weight to either the States' fundamental interest in administering their prisons or the corresponding interest in being afforded the first opportunity to address problems relating to prison conditions. As this Court has recently reaffirmed, however, "[t]he strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors . . . also require giving the States the first opportunity to correct errors made in the internal administration of their prisons." *Lewis v. Casey*, 116 S.Ct. 2174, 2185 (1996) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973)). *See also Nasim v. Warden, Maryland House of Correction*, 64 F.3d 951, 959 (4th Cir. 1995) (en banc) (Wilkinson, J., concurring), *cert. denied*, 116 S.Ct. 1273 (1996) ("State bodies should be the ones to hear complaints about state prison management."). The court of appeals was wrong, therefore, to give no weight to this important State interest.

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[1](...continued)
twenty-three State administrative procedures (two of which had lapsed) and an additional eight local and county procedures (one of which had lapsed and one of which was conditional). FEDERAL BUREAU OF PRISONS, CERTIFICATION OF INMATE GRIEVANCE PROCEDURES PURSUANT TO THE CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT (Nov. 1995 & July 8, 1996 Update). The PLRA no longer distinguishes between certified and non-certified procedures, but requires exhaustion of all available administrative remedies.

The court exacerbated that error in casting aside Congress's primary purpose in enacting the PLRA: "imposing legitimate limits on the ability of inmates to tie the courts and prisons in knots through frivolous lawsuits . . . and reducing litigation costs." *Senate Judiciary Committee Hearing on Prison Reform: Enhancing the Effectiveness of Incarceration*, 141st Cong., 2d Sess. (July 27, 1995) (statement of Sen. Hatch). *See also* 141 Cong. Rec. S14,316 (daily ed. Sept. 26, 1995) (statement of Sen. Abraham) (PLRA "will discourage frivolous lawsuits and promote State control over State prison systems"); *Senate Judiciary Committee Hearing on Prison Reform: Enhancing the Effectiveness of Incarceration*, 141st Cong., 2d Sess. (July 27, 1995) (testimony of William P. Barr) ("[T]he business of running prisons belongs to the appropriate state officials, not to federal judges, justice department officials, or special masters . . . ."). As the dissenting judge below recognized, applying 42 U.S.C. § 1997e(a) to cases pending on the date of its enactment fulfills this purpose by serving "the important function of allowing the State to deal with these particularly local problems on its own, while preserving for the state prisoner an expeditious federal forum for the vindication of his federally protected rights, if the State has denied that redress." (App. A-20-A-21) (quoting *Preiser*, 411 U.S. at 498).

In disregarding these goals, the court of appeals' decision leaves in place the precise problem that Congress sought to address when it enacted the PLRA: reducing the staggering amount of frivolous prisoner litigation clogging the federal courts and consuming the States' time and resources. The decision below should be reviewed because it is fundamentally inconsistent with this Court's precedents.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS.

Review is also warranted because the court of appeals' decision is in conflict with decisions of several federal appellate courts construing other provisions of the PLRA that contain language similar to the "[n]o action shall be brought" language contained in 42 U.S.C. § 1997e(a). *See* 28 U.S.C. § 1915(a)(2) ("A prisoner *seeking to bring* a civil action or appeal" without prepayment of fees must submit a certified copy of the prisoner's trust account) (emphasis added); *id.* § 1915(b)(1) ("if a prisoner *brings* a civil action or *files* an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee") (emphasis added); *id.* § 1915(g) ("In no event *shall* a prisoner *bring* a civil action or appeal" *in forma pauperis* if the prisoner has had three previous actions dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted) (emphasis added).

Some courts of appeals have narrowly interpreted these statutory variations of "to bring," as the court did below, (App. A-6-A-7), to apply them only to the bringing of new actions. *See Abdul-Wadood v. Nathan*, 91 F.3d 1023 (7th Cir.1996) (three strikes provision applies only to cases filed after the PLRA's effective date); *Thurman v. Gramley*, 97 F.3d 185 (7th Cir.1996) (filing fee provision only applies to new cases and appeals);[2] *White v. Gregory*, 87 F.3d 429 (10th Cir.), *cert. denied*, 117 S.Ct. 528 (1996) (same). In *Abdul-Wadood*, for example, the court of appeals held that, despite the fact that the prisoner had "at least five strikes

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[2] The court in *Thurman* also commented, however, that "we think that the Act generally applies to pending cases." 97 F.3d at 188.

against him," the court would not dismiss any action remaining on its docket (or pending in the district court) because the three strikes provision applies only to new actions or appeals -- "the events that trigger an obligation to pay a docket fee -- rather than the disposition of existing cases." 91 F.3d at 1025.

Contrary to these decisions and to the lower court's conclusion that Congress expressly prescribed the proper reach of 42 U.S.C. § 1997e(a) by its use of the language "[n]o action shall be brought" (App. A-6), other courts of appeals have interpreted the same statutory variations of "to bring" more broadly to apply to pending cases. For example, in *Adepegba v. Hammons*, 103 F.3d 383 (5th Cir.1996), the court of appeals dismissed a prisoner appeal under 28 U.S.C. § 1915(g) on the ground that the prisoner had already filed three frivolous suits that were dismissed prior to the effective date of the PLRA. The court reasoned that although the three strikes provision "attaches consequences to past actions, . . . these consequences are matters of procedure" that do not affect any substantive rights, do not bar access to the courts, and still permit a prisoner to pursue any substantive claim as long as he or she pays the filing fee. 103 F.3d at 386. The court also observed that "[t]he revocation of this privilege [of proceeding *in forma pauperis*] is not new, either," as a court could revoke a prisoner's *in forma pauperis* status even before the PLRA. *Id.* at 387. Accordingly, the court held that the three strikes provision does not raise retroactivity concerns under *Landgraf*. *See also Covino v. Reopel*, 89 F.3d 105 (2d Cir.1996) (filing fee provisions should apply to appeals pending at the effective date of the PLRA);[3] *Ayo*

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[3] The United States Court of Appeals for the Second Circuit has adopted an exception to the general rule of retroactive application

(continued...)

v. Bathey, 106 F.3d 98 (5th Cir.1997) (same); *Strickland v. Rankin County Correctional Facility*, 105 F.3d 972 (5th Cir.1997) (same); *In re Tyler*, 110 F.3d 528 (8th Cir.1997) (denying prisoner leave to proceed *in forma pauperis* because more than three previous actions had been dismissed as frivolous, all of which occurred before the effective date of the PLRA); *Green v. Nottingham*, 90 F.3d 415 (10th Cir.1996) (same); *Mitchell v. Farcass*, ___ F.3d ___, 1997 WL 225487 at *4 (11th Cir. 1997) (PLRA provision permitting court to dismiss action if it is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune is "wholly procedural" and, therefore, applies to pending cases).

If the reasoning of the courts in *Adepegba* and similar decisions is correct, then that reasoning should apply with equal force to the PLRA's administrative exhaustion requirements. As the dissent below stated, "the statutory language 'no action shall be brought' until all available remedies are 'exhausted,' should be interpreted to mean what is obviously intended -- that a federal court should not 'decide' the merits of any such action prematurely. . . . [I]t is obvious that Congress did not literally mean to bar a prisoner from 'filing' a complaint in court. The only interpretation of the language that makes sense is that a federal court will not adjudicate the claim until after exhaustion." (App. A-23). If, on the other hand, the court below correctly interpreted 42 U.S.C. § 1997e(a) to apply only to cases that are commenced after the PLRA's

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[3](...continued)
and held that the fee provisions need not apply to cases in which the parties or the court had already invested substantial time and effort. *Ducamutef v. O'Keefe*, 98 F.3d 22 (2d Cir.1996); *Ramsey v. Coughlin*, 94 F.3d 71 (2d Cir.1996).

effective date, then that reasoning should apply to the other similarly-worded provisions of the PLRA which have been interpreted differently by other federal appellate courts.

Review is warranted to resolve this confusion among the federal circuits and to clarify the proper application of 42 U.S.C. § 1997e(a).

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

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Supreme Court, U.S.
FILED
JUL 11 1997
OFFICE OF THE CLERK

No. 96-1811

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

TERRY MORRIS, ET AL.,

Petitioners,

v.

JOHN L. WRIGHT, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF

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42 U.S.C. §1997e(a) . . . . . *passim*

REPLY BRIEF OF PETITIONERS

In their brief in opposition, respondents offer two primary explanations why the Court should deny certiorari: They contend that the case is moot and that the decision below does not implicate a lower-court conflict over the applicability of the Prison Litigation Reform Act ("PLRA" or "Act") to pending cases. Neither explanation is persuasive. And neither explanation undermines the arguments in favor of certiorari raised by the four petitioning States -- Kentucky, Michigan, Ohio and Tennessee -- or those offered by the 19 other States that filed an *amicus* brief supporting the petition. *See Amicus* Brief of Maryland, *et al.*

1. Respondents initially argue that the Court should deny certiorari because the action is moot. Opp. Br. 1-2. That is wrong as a matter of fact and law.

Factually, respondents' mootness argument contains a vital missing element: One of the consolidated actions in this case continues to be a live controversy. The Sixth Circuit, it is true, dismissed three of the four inmate claims in separate opinions after consolidating these cases to address the retroactivity of the exhaustion requirements of the PLRA. But, importantly, the appellate court did not dismiss the fourth action -- *Thaddeus-X, et al. v. Blatter, et al.* -- which remains very much alive in the Sixth Circuit and may well continue to be litigated in the district court after that. *See Thaddeus-X, et al. v. Blatter, et al.*, ___ F.3d ___, 1997 U.S. App. LEXIS 14468 (6th Cir. June 12, 1997).

Legally, respondents' mootness claim is even less tenable. It simply does not matter that just one of the four consolidated actions remains live, or that little good allegedly can come from even that claim. The claimant in *Thaddeus-X* has chosen not to dismiss his case and, until he does, respondents cannot even begin to make out a colorable claim that this consolidated dispute no longer presents an Article III

case or controversy. Not surprisingly, under these circumstances, respondents have yet to cite a single case to support this argument. In fact, no such authority exists.

At any rate, even if respondents had lost all four collateral actions in the Sixth Circuit, the court's separate retroactivity decision in this consolidated action would still present an Article III controversy. Just because a petitioner prevails on the merits of an underlying substantive dispute does not invariably moot the case on all other issues. As *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 333-334 (1980), observed,

> appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits so long as that party retains a stake in the appeal satisfying the requirements of Art. III.

(Footnote omitted).

The reason for this approach is straightforward. When litigants win the battle (here, rejection of three of the individual inmate claims) but lose the war (here, no application of the PLRA to pending cases), they face a compelling *stare decisis* predicament. In this instance, for example, the States obtained a negative ruling affecting thousands of other claims, as Judge Merritt noted in dissent, Pet. at A-19, and yet under respondents' view the States would have no realistic mechanism for challenging the decision. This is precisely why *Roper* ruled the way it did. *Id.* at 336-337. Nor is *Roper* alone on this point. Cases pre-dating it and post-dating it, and cases from this Court and the lower courts, have reached the same sensible conclusion.

See Electrical Fittings Corp. v. Thomas & Betts Co., 307 U.S. 241 (1939); *Edward J. DeBartalo Corp. v. National Labor Relations Board*, 463 U.S. 147, 153 n.5 (1983); *International Brotherhood of Electrical Workers v. Interstate Commerce Commission*, 862 F.2d 330, 334 (D.C. Cir. 1988).

In the end, respondents' mootness claim is simply mistaken. And, because this is the only jurisdictional or procedural bar that respondents have raised, the argument only highlights the fact that no obstacle stands in the way of using this case as a vehicle to address the important questions presented.

2. Respondents next argue that the petition does not implicate a split of authority in the lower courts, either on the first or the second question presented. Opp. Br. 4-7. They are wrong on both fronts.

a. The first question presented is whether Congress textually resolved the retroactivity issue by providing that "no action shall be brought" until a prisoner has exhausted his or her administrative remedies. 42 U.S.C. 1997e(a). Respondents offer no meaningful response to the conflict of authority between the Sixth Circuit's ruling in this case and the lower-court rulings involving other PLRA provisions that also refer to the "bringing of causes of action." Not only did these courts engage in an analysis of virtually identical provisions of the PLRA, but their analyses also specifically cover section 1997e(a) as well. For example, the Second Circuit's analysis concerning section 1915(a) and (b)'s restrictions on "bring[ing] a civil action" broadly contradicts the Sixth Circuit's analysis: "[T]he PLRA contains no effective date provisions and none of its provisions gives any explicit indication as to whether the act would have any application to pending appeals." *Covino v.*

Reopel, 89 F.3d 105, 106 (2d Cir. 1996), *cert. denied*, 117 S.Ct. 1265 (1997). *See also Leonard v. Lacy*, 88 F.3d 181 (2d Cir. 1996). The Fifth Circuit likewise broadly found "that Congress specified no effective date for the PLRA." *Adepegba v. Hammons*, 103 F.3d 383, 385 (5th Cir. 1996). Indeed, in the short time since the petition was filed, this split has deepened. The Fourth Circuit recently determined that §803 of the PLRA, which contains the amendments to §1997e, lacks a textual preference on the question of retroactivity. "[N]othing in §803 of the P.L.R.A.," the court found, "expressly prescribes its reach" for purposes of the first stage of the *Landgraf* analysis. *Alexander S. v. Boyd*, 113 F.3d 1373, 1387 (4th Cir. 1997).

Nor are respondents correct in suggesting that this growing split of authority is inapposite. As the appendix to this brief illustrates, the division of authority concerns other sections that, like section 1997e(a), use the operative word "bring." *See* Appendix. In view of the Sixth Circuit's focus on this very verb in the first stage of its *Landgraf* analysis, other like provisions of the PLRA plainly are covered by its analysis.

Since the petition was filed, moreover, another lower court confirmed this point and specifically disagreed with the Sixth Circuit's decision in doing so. Adhering to the Second Circuit's decision in *Covino*, which concerned 1915(a) and (b)'s restrictions on "bring[ing] a civil action," the court held that the amendment to §1997e(a) does in fact apply to cases pending on the date of their enactment.

> Given the reasoning of the Second Circuit in *Covino*, I must decline to follow *Wright*, and must hold that the exhaustion of remedies clause of the P.L.R.A. does apply

> retroactively. First, *Congress' intent is not apparent in the wording of the P.L.R.A.* The Sixth Circuit in *Wright* relied on the use of the words "shall be brought" to demonstrate that Congress intended to apply the statute prospectively. *Id.* at 418. By contrast, the Second Circuit in *Covino* held that Congress' intent is unclear in Section 804(b)(1) of the P.L.R.A. 89 F.3d at 106. As noted above, this section of the P.L.R.A. uses the same wording -- "shall be brought" -- as the exhaustion of remedies clause. The Second Circuit's interpretation is not only controlling but also, from a grammatical perspective, compelling. The verb "shall," as it appears in the P.L.R.A., is used in an imperative sense; it is not in the future simple tense as the Sixth Circuit reading would require. With a negative attached -- "no action shall be brought" -- the plain sense of the statute is to bar prisoner lawsuits unless administrative remedies have been exhausted.

Salahuddin v. Mead, 1997 U.S. Dist. LEXIS 8895, at *8-9 (S.D.N.Y. June 26, 1997) (emphasis added).

The analysis of one provision of the PLRA concerning the "bringing" of inmate actions thus bears directly on other similarly-worded provisions. Accordingly, whether one looks at the direct conflict involving the Sixth Circuit's

analysis and *Salahuddin* or the broader one concerning other similarly-worded provisions of the PLRA, the conclusion is the same: The lower courts now need, and presumably will continue to need, guidance on the point.

b. The petition also showed a conflict of authority concerning the second question presented -- namely, whether the PLRA applies to pending cases under the *Landgraf* default rules. Here, too, the opposition brief comes up short. With the exception of arguing that cases construing the jurisdictional nature of the Federal Torts Claims Act ("FTCA") are inapposite, Opp. Br. 7-8, they offer no response to the burgeoning lower-court disagreement about how to apply the *Landgraf* default rules in the context of the PLRA. These cases also are extremely relevant -- since the procedural or jurisdictional nature of an amendment has special meaning under *Landgraf*. Indeed, in contrast to the Sixth Circuit, several lower courts have specifically held that §1997e(a) is jurisdictional, and others have found the procedural nature of the changes to the PLRA to be dispositive. Pet. 13-14. Similar decisions, once again, have been issued since the petition was filed. *See Salahuddin v. Mead*, 1997 U.S. Dist. LEXIS 8895 (S.D.N.Y. June 26, 1997) (specifically rejecting Sixth Circuit's analysis of § 1997e(a)); *Morgan v. Arizona Dept. of Corrections*, 1997 U.S. Dist. LEXIS 8400 (D. Ariz., May 31, 1997) (characterizing § 1997e(a) as jurisdictional); *Turner v. Boutista*, 1997 U.S. Dist. LEXIS 8373 (N.D. Cal. June 10, 1997) (same).

3. Nor can there be any doubt that the questions presented are national in scope and important in nature. Conspicuously missing from the brief in opposition is any argument to the contrary. As shown in the petition, Pet. 6-8, 15, the dispute raises questions casting a shadow over thousands of cases throughout the country. As the presence

of four States on the petition suggests, and as the Maryland *amicus* brief on behalf of 19 other States confirms, this is an important issue with wide implications -- both with respect to the retroactivity of the exhaustion requirements of the PLRA and of the other provisions of the Act using similar operative language. In view of the substance of the conflict of authority when the petition was filed, the growth in the conflict since, and the likely development of the conflict as the summer progresses, it seems exceedingly unlikely that the issue will go away.

4. Finally, respondents offer arguments on the merits as to why the PLRA generally, or even section 1997e(a) specifically, should not apply to pending cases. *See* Opp. Br. 2-3, 8-11. These of course are not compelling grounds for denying the writ in view of the importance of these questions and of the difficulty the lower courts have had in resolving them. Nonetheless, they merit a brief response.

First, respondents note that the PLRA contains 10 sections, only one of which provides specifically for retroactive application of the law. Accordingly, the argument goes, one must infer that Congress did not intend the other nine provisions to apply to pending cases. Opp. Br. 2-3. This is wrong under *Landgraf*, 511 U.S. at 258-262, and indeed even the Sixth Circuit was agnostic about this argument, *Wright v. Morris*, ("[s]uch an argument would normally not be dispositive") (Pet. at 4-7).

The section on which respondents rely simply deals with the States' authority to alter prison administration consent decrees, many of them decades old. Congress thus had a unique explanation for focusing on the retroactivity of the provision since it dealt with injunctive decrees that in many cases were finally appealed long before the PLRA's enactment. That situation of course does not exist with the

other sections of the PLRA, where the States are arguing only that pending cases are affected by its provisions, not that finally-appealed rulings must be revisited under the section.

Next, respondents argue as a matter of policy that Congress cannot have intended that the exhaustion provision be applied retroactively in view of the statute of limitations problems it will generate. Even assuming the relevance of this inquiry, it is not persuasive. A ruling for the States puts them to a choice: They can either (i) exercise their exhaustion rights by waiving limitations bars and providing a venue for exhaustion or (ii) allow the federal action to proceed. But the whole point of the PLRA was to give the States greater control over this very inquiry. At all events, the decision of the four States involved in this case to seek certiorari and of 19 other States to support them in this effort directly undermines respondents' suggestion that the retroactive application of section 1997e(a) will have little effect.

Finally, the Court's recent decisions in *Lindh v. Murphy*, 65 U.S.L.W. 4557 (1997), and *Hughes Aircraft Co. v. United States*, 65 U.S.L.W. 4447 (1997), do not alter these conclusions. *Lindh* determined whether the amendments to 28 U.S.C. Chapter 153, made by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), apply to pending cases. In concluding that they do not, the Court found that Congress textually limited application of the provisions to later-filed cases. That holding, the Court determined, followed from the negative implication of Congress's decision to make another portion of AEDPA applicable to pending cases. In particular, the Court found that no alternative explanation existed for Congress's decision to specify that one portion of the Act (but not others) applied to pending cases. 65 U.S.L.W. at 4560-4561. By contrast, as

shown above, no such inference exists here. Congress had every reason to specify the retroactivity of one provision of the PLRA but not the others. As one post-*Lindh* decision has noted,

> a plain reading of Section 802 shows that Congress inserted such specific retroactive language in order to emphasize the unusually far-reaching consequences of this retroactivity provision. The provision seems to extend Section 802 even to injunctive remedies already in place, and even if the case in which the relief was granted has long been concluded.

Salahuddin v. Mead, 1997 U.S. Dist. LEXIS 8895 at **9-10 (footnote omitted).

Hughes Aircraft is no more helpful. At issue was whether amendments to the federal false claim statutes applied to pending cases. Notably, this was a change in law that created liability that did not previously exist (a core consideration under *Landgraf*, 511 U.S. at 283-285), while the PLRA simply alters the prospective relief inmates may obtain in federal court. The former is substantive and imposes liability for primary conduct that would not have been actionable pre-enactment; the latter is procedural and simply affects the nature of the prospective relief federal courts have authority to give.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, we respectfully submit that the writ should be granted.

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DATE: July 9, 1997

APPENDIX

CASES ON THE APPLICABILITY OF KEY PROVISIONS OF THE P.L.R.A. TO CASES PENDING AT DATE OF ENACTMENT

(1) 42 U.S.C. §1997e(a) (exhaustion of administrative remedies)

Second Circuit	*Salahuddin v. Mead*, 1997 U.S. Dist. LEXIS 8895 (S.D.N.Y. June 26, 1997) (applies)
Sixth Circuit	*Wright v. Morris*, 111 F.3d 414 (6th Cir. 1997) (does not apply)
Seventh Circuit	*Malone v. Godinez*, 1997 U.S. Dist. LEXIS 6201 (N.D. Ill., April 28, 1997) (does not apply)

(2) 28 U.S.C. §1915(a); and/or (b) (filing fee provisions)

Second Circuit	*Covino v. Reopel*, 89 F.3d 106 (2d Cir. 1996), *cert. denied*, 117 S.Ct. 1265 (1997) (applies)
Fifth Circuit	*Ayo v. Bathey*, 106 F.3d 98 (5th Cir. 1997) (applies)
Seventh Circuit	*Thurman v. Gramley*, 97 F.3d 185 (7th Cir. 1996) (does not apply)
Ninth Circuit	*Rodgers v. Deboe*, 950 F.Supp. 1024 (S.D. Cal. 1997) (does not apply)

Tenth Circuit	*White v. Gregory*, 87 F.3d 429 (10th Cir. 1996), *cert. denied*, 117 S.Ct. 528 (1996) (does not apply)

(3) 28 U.S.C. §1915(g) (denies pauper status to inmates who have previously abused that status)

Third Circuit	*Deutsch v. United States*, 1996 U.S. Dist. LEXIS 13937 (E.D. Pa., July 9, 1996) (does not apply)
Fifth Circuit	*Adepegba v. Hammond*, 103 F.3d 383 (5th Cir. 1996) (applies)
Sixth Circuit	*Witzke v. Hiller*, 1997 U.S. Dist. LEXIS 7180 (E.D. Mich., May 20, 1997) (applies)
Seventh Circuit	*Abdul-Wadood v. Nathan*, 91 F.3d 1023 (7th Cir., 1996) (does not apply)
Eighth Circuit	*Lyon v. Krol*, 940 F.Supp. 1433 (S.D. Iowa 1996) (applies)
Tenth Circuit	*Green v. Nottingham*, 90 F.3d 415 (10th Cir., 1996) (applies)

(4) 42 U.S.C. §1997(d) (limitations on attorneys' fees)

Fourth Circuit	*Alexander S. v. Boyd*, 113 F.3d 1373 (4th Cir. 1997) (applies)

Seventh Circuit	*Cooper v. Casey*, 97 F.3d 914 (7th Cir. 1996) (does not apply)
Eighth Circuit	*Jensen v. Clarke*, 94 F.3d 1191 (8th Cir. 1996) (does not apply)

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REASONS FOR DENYING THE WRIT

Before responding to the arguments raised by the States, the Prisoners suggest that the pending petition for a writ of *certiorari* is moot. Supreme Court Rule 15.4. The Sixth Circuit held that § 1997e(a) was not retroactive to cases that were pending in the Court of Appeals on April 25, 1996, the date that the PLRA was enacted. *Wright v. Morris*, 111 F.3d 414 (6th Cir. 1997). The court also ruled against the prisoner-plaintiffs *on the merits* in three of the four cases, holding that the lower courts had properly granted summary judgment against, or properly dismissed, the Prisoners' complaints. Where the Court of Appeals has already affirmed the judgments against the plaintiffs on the merits, and where those judgments have not been appealed, the retroactivity of the administrative exhaustion provision of the PLRA is moot. That is, whether or not these prisoner-plaintiffs should have been required to exhaust their administrative remedies (retroactively), they cannot do so now since the Court of Appeals has entered a final judgment against them and no appeal has been taken by them from the adverse decision on the merits. In sum, there is no administrative remedy for the prisoner-plaintiffs to exhaust because the Sixth Circuit has entered a final appellate judgment against them on the merits, and no appeal has been taken.

In the fourth case, *Thaddeus-X and Bell v. Blatter*, 110 F.3d 1233 (6th Cir. 1997), the Sixth Circuit reversed on the merits and remanded the case. At this point the plaintiffs seek money damages. However, in Michigan, unlike some other states, there is no administrative complaint the plaintiffs could file, nor appeal they could pursue, which would allow them to recover money damages via a state administrative process. As a result, even if this Court were to grant *certiorari* and hold that the PLRA must be applied retroactively, the plaintiffs

would have no state administrative remedy to exhaust.[1]

The issue of retroactivity is moot as to the plaintiffs in the four consolidated cases. The claims of the plaintiffs in three cases are barred by final judgment, and, in the fourth case, only claims for damages are left to litigate, and as to those claims (or even injunctive claims) no administrative relief is possible. These consolidated cases were never certified as a class action. The plaintiffs' claims in all four cases are now moot as far as the retroactivity of the exhaustion provision of the PLRA is concerned.

I. CONGRESS ITSELF LIMITED APPLICATION OF THE PLRA'S STATE-EXHAUSTION REQUIREMENTS TO CASES BROUGHT AFTER ITS EFFECTIVE DATE.

The question decided by the Sixth Circuit was whether the PLRA's exhaustion requirement applied to cases already filed on the date of its enactment. The Sixth Circuit answered this question by resorting to accepted canons of statutory construction, beginning with the plain language of the PLRA. The language of Section 1997e(a) itself compels prospective application:

> No action shall be brought with respect to prison conditions under [Section 1983], by a prisoner confined in any jail, prison or other correctional facility until such administrative remedies as are available are exhausted.

The key language of the statute is "shall be brought." That language anticipates future action, that is, action taking place after the enactment of the statute. Had Congress intended a different meaning, it could have used language which expressly indicated a retroactive effect. This interpretation is bolstered by analysis of the other sections of the statute. In fact, only one of ten sections of the

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[1] To the extent that the prisoner-plaintiffs originally sought injunctive relief to stop the defendants from retaliating against them, the Court should note that the defendants' actions occurred in May and June of *1994*. There is no longer any realistic likelihood that the problems are continuing to this day. Indeed, three years after the fact, an administrative hearing could not provide any meaningful remedy whatever.

PLRA provides specifically for retroactive application of the law. Section 802(b)(1) provides:

> Section 3626 of title 18, United States Code, as amended by this section, shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title.

By this special provision, Congress demonstrated that where it intended retroactivity within the PLRA, it clearly specified it. Since nine sections make no mention whatsoever of any retroactivity, the logical conclusion is that Congress intended those sections to be applied prospectively. If Congress had failed to designate § 802(b)(1) as retroactive, that Section would also have been concluded to be prospective.

II. THE SIXTH CIRCUIT CORRECTLY HELD THAT LANDGRAF V. U.S.I. FILM PRODUCTS BARS RETROACTIVE APPLICATION OF THE PLRA

The States contend that the Sixth Circuit erred in applying *Landgraf v. U.S.I. Film Products*, 511 U.S. 244 (1994). According to the States, the rules of interpretation set out in *Landgraf* require that the PLRA be applied to cases pending at the time of its enactment. A close reading of *Landgraf* reveals the accuracy of the Sixth Circuit's analysis.

A. The Sixth Circuit properly applied Landgraf

In *Landgraf*, this Court considered the retroactive application of amendments to the Civil Rights Act of 1991. This Court reiterated a bedrock principle that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Id.* at 265, citing, *Bradley v. Richmond*, 416 U.S. 696, 711; *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 206. As in this case, the provisions considered in *Landgraf* were silent on retroactivity. This Court noted that it traditionally refused to give retroactive effect to a statute unless "clear, strong, and

imperative" language "so clear and positive as to leave no room [for] doubt that such was the intention of the legislature" required the result. *Id.* at 270, 272.

The *Landgraf* Court once and for all explained the procedure for retroactivity review. "If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Id.* This analytical framework developed through a series of cases culminating in *Landgraf*. *Landgraf* provided the federal courts with one clear and precise guide for deciding retroactivity cases rather than requiring lower courts and parties to search and dissect a group of cases to determine which among them applied.

After *Landgraf*, there is only one analytical framework for the lower courts, and the Sixth Circuit applied it in this case to reach the correct result. Therefore, the States' reliance on *Weinberger v. Salfi*, 422 U.S. 749 (1975), a decision which predates *Landgraf* by twenty years, is misplaced. The Sixth Circuit properly applied the *Landgraf* framework to reach the correct result.

B. The Sixth Circuit's analysis and conclusion does not conflict with decisions from other Circuits.

The States suggest that the Sixth Circuit's decision conflicts with decisions from other courts holding the PLRA's exhaustion requirement to be jurisdictional. In fact, there is no Circuit split.

First, the States rely on the Ninth Circuit's remand of cases to comply with administrative exhaustion. Contrary to the States' assertion, the Ninth Circuit has not ordered that § 1997(e) be applied retroactively. In *Berry v. Gomez*, 108 F.3d 336 (9th Cir. 1997) (Table), 1997 U.S. App. LEXIS 3234, 1997 W.L. 75578, the Court remanded the case and instructed that on remand the district court should consider the effect of the PLRA, particularly the exhaustion requirement. The

Ninth Circuit did not require the exhaustion of administrative remedies in a case filed before the enactment of the PLRA; it merely required the district court to determine whether the enactment had any effect on the case. Likewise in *St. Hilaire v. Arizona*, 87 F.3d 1321 (9th Cir. 1996) (Table), 1996 U.S. App. LEXIS 16778, 1996 W.L. 341280, the Ninth Circuit merely stated that on remand, the issue of exhaustion should be revisited, particularly in light of the amendments to § 1997e which may be applicable. That court did not decide whether the exhaustion provision would apply retroactively; it merely instructed the district court to consider whether the PLRA had any applicability to the case. Moreover, in *St. Hilaire*, the exhaustion had originally arisen under the pre-PLRA version of § 1997e which allowed a district court to stay an action pending exhaustion under certain circumstances.[2]

Second, the cases[3] the States cite for the proposition that other courts have found PLRA's administrative exhaustion provision to be jurisdictional are all unpublished district court opinions on motions to dismiss which address the jurisdictional nature of exhaustion in passing, citing only to a case which finds a different statute's exhaustion provision to be jurisdictional. Conversely, the Sixth Circuit opinion in this case goes to great lengths to analyze correctly the non-jurisdictional nature of the specific exhaustion provision at issue in this case, indeed to contrast the language of the PLRA to that of other statutes which have been found to be jurisdictional.

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[2] Importantly, too, both opinions of the Ninth Circuit to which petitioners cite are unreported decisions, which according to the Ninth Circuit itself may not be cited to, or by, the courts of that circuit except as provided by Ninth Circuit Rule 36-3. Consequently, neither carries any precedential value, even in its own Circuit.

[3] *Bell v. Calderon*, No. C96-4398 SI, 1997 U.S. Dist. LEXIS 4373, 1997 W.L. 168564 (N.D. Cal. Apr. 1, 1997); *Eakins v. Madrid*, No. C 96-2229 SI, 1996 U.S. Dist. LEXIS 19150, 1996 W.L. 743812 (N.D. Cal. Dec. 17, 1996); and *Hernandez v. Steward*, No. 96-3222-SAC, 1996 U.S. Dist. LEXIS 18076, 1996 W.L. 707015 (D. Kan. Nov. 27, 1996).

Finally, the States contend that the Sixth Circuit's decision in this case is at odds with decisions of other circuits discussing other sections of the PLRA. The cases cited by the States all deal with sections of the PLRA which amend 28 U.S.C. 1915, governing the *in forma pauperis* provisions. None of the changes made by the PLRA to that statute would prohibit an inmate from bringing an action; they only change his or her ability to file as a pauper.

In deciding that such changes were procedural in nature, and thus could be applied retroactively, the courts noted that the inmates were not being deprived of the right to file a lawsuit. *See Adepabda v. Hammons*, 103 F.3d 383, 386 (5th Cir. 1996) (§ 1915(g) does not affect a prisoner's substantive rights and does not block the prisoner's access to the courts); *Covino v. Reopel*, 89 F.3d 105, 108 (2d Cir. 1996) (already filed complaint might well prevent retroactive application of new complaint rules where their application risked dismissal and a resulting time bar to plaintiff's cause of action, or even if dismissal was ordered without prejudice, risked the waste of significant time and effort by plaintiff in investigating the facts of the case and framing the complaint under the prior rules).

The *Covino* court specifically stated that a statute should not be applied retroactively if that application might result in dismissal of a pending action and erect a subsequent time bar to its refiling. The Sixth Circuit specifically addressed this issue and held that the exhaustion provision should not be applied retroactively precisely because of the risk of such dismissal.

Remanding these cases for exhaustion would also cause unnecessary future jurisprudential questions. The events giving rise to these cases occurred several years ago; in some, the statute of limitations has expired. Although all four of the states' representatives stated at oral argument that they would waive any applicable time limits on filing administrative claims, none could offer

satisfactory assurance that they had the authority to extend the applicable statutes of limitations. Were the Court to apply the new law to these cases, it is not completely certain that the statutes of limitations would be tolled. *Wright*, 111 F.3d at 422-23.

The Sixth Circuit's decision is the first to directly address this issue. The well reasoned opinion thoroughly discussed the applicable law. There is no reason to believe that the other circuits will not follow this decision as they confront this issue. However, because this is a case of first impression in the other circuits, it is too early to determine that this view will be adopted by the other circuits. This Court should not address this issue until more than one circuit has had an opportunity to consider this issue. *See* Supreme Court Rule 10(a).

C. The PLRA is distinguishable from the FTCA; comparisons between the two provisions are inappropriate.

The States assert that the administrative exhaustion provision of the PLRA should be applied retroactively because the Federal Tort Claims Act (FTCA) which has almost identical language has been applied retroactively and the exhaustion provision of that statute has been determined to be jurisdictional. (Petition for Writ of Certiorari at 14-15).

The FTCA was originally enacted on August 2, 1946. At that time, the statutory provisions were expressly made retroactive to all claims accruing on or after January 1, 1945. Congress thus specified that the statute was to be retroactive. When 28 U.S.C. 2675(a) was approved on July 18, 1966, as an amendment to the FTCA, it was expressly made prospective as to all claims "accruing six months or more after the date of enactment." None of the cases listed by the States was pending at the time of either the passage of the original

FTCA or the approval of the 1966 amendment.[4]

The only point established by the cases cited by the States is that circuit courts consistently decline to rule on any action under the FTCA until all administrative remedies have been exhausted, as required by the statute. However, given the specific language in both the original FTCA and its amendment denominating the time frame for application of the provisions, any suggestion that the FTCA necessitates retroactive application of PLRA is misplaced. Quite simply, the unique nature of the FTCA, and the amendment, make it inapplicable to the PLRA

III. CONGRESS CANNOT HAVE INTENDED THAT THE EXHAUSTION PROVISION OF THE PLRA BE APPLIED RETROACTIVELY BECAUSE TO DO SO WOULD DISRUPT TWO LEVELS OF FEDERAL COURT DOCKETS AND ADMINISTRATIVE AGENCIES IN ALL 50 STATES.

Section 803 of the PLRA amended the administrative exhaustion requirement 42 U.S.C. § 1997e. The former provision stated that a district court "*shall*, if the court believes that such a requirement would be appropriate and in the interests of justice, . . . continue [a prisoner's rights] case for a period of not to exceed 180 days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available." *Id.*[5]

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[4] *McNeil v. United States*, 508 U.S. 106 (1993)(suit filed on March 6, 1989); *Bowden v. United States*, 106 F.3d 433 (D.C. Cir. 1997) (suit filed October, 1992); *Cotto v. United States*, 993 F.2d 274 (1st Cir. 1993) (suit filed February 24, 1989); *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502 (2d Cir. 1994); (suit filed December 21. 1992); *Livera v. First Nat'l State Bank*, 879 F.2d 1186 (3d Cir.), *cert. denied sub. nom, Livera v. United States Small Bus. Admin.*, 493 U.S. 937 (1989)(litigation commenced in 1981); *Ahmed v. United States*, 30 F.3d 514 (4th Cir. 1994)(suit filed June 23, 1992); *Price v. United States*, 81 F.3d 520 (5th Cir.), *cert. denied*, 117 S. Ct. 295 (1996)(suit filed August 9, 1983); *Ezekiel v. Michel*, 66 F.3d 894 (7th Cir. 1995)(suit filed after November 1993); *Wilson v. Drake*, 87 F.3d 1073 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1311 (1997)(suit filed in June 1993); *Kendall v. Watkins*, 998 F.2d 848 (10th Cir. 1993), *cert. denied*, 510 U.S. 1120 (1994)(suit filed in June 1990).

[5] Section 2 of the former law required exhaustion of administrative remedies when the United States Attorney General certified, or the district court determined, that such remedies were in substantial compliance with the minimum acceptable standards laid out under subsections (b)-

Thus, under the *old* law, administrative exhaustion was clearly mandatory in every case in which it would be effective. The district court had both the authority and the duty to issue a stay and remand the case for state administrative review (1) where appropriate, (2) where justice would be served, and (3) where the review process substantially equaled federal guidelines or was "otherwise fair and effective." In other words, *every* case pending in the Sixth Circuit on May 25, 1996, should already have been subjected to the state administrative process if the case had any realistic chance of being resolved by that process.

The one dependable rule in exhaustion cases is that a plaintiff need not exhaust a remedy that would be futile. *See Clayton v. U.A.W.*, 451 U.S. 679 (1981). Both as a matter of court administration and public policy, it makes no sense to remand some 500 cases so that they can be sent back to state administrative agencies for a futile administrative process.

The *Thaddeus-X and Bell* case is illustrative. The prisoner-plaintiffs seek money damages for alleged retaliation by prison guards (which occurred three years ago, in the spring of 1994).[6] Michigan's administrative remedies do not permit the recovery of money by prisoners. If the case were remanded to the Michigan Department of Corrections, there is literally nothing that the MDOC could do for them. *See also*, *Prunty v. Branson*, 7 F.3d 234 (6th Cir. 1993) (Table), 1993 W.L. 328037 (abuse of discretion for district court to stay action

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(d) of the law "or were otherwise fair and effective." *Id.* Although 42 U.S.C. § 1997e was passed in 1980, many states never sought certification or delayed it for years. According to United States Department of Justice data, Ohio's procedures were certified on September 11, 1987, and Tennessee's were certified on May 26, 1993, before the respective complaints in these actions filed. Michigan's procedures were certified on April 18, 1995, some nine months after Thaddeus-X and Bell filed their complaint. However, there is no indication that Michigan's procedures before April, 1995, were not "otherwise fair and effective." *See Hadix v. Johnson*, 977 F.2d 996 (6th Cir. 1992). Kentucky's procedures were never certified before certification was rescinded in 1996 by the passage.

[6] The misconduct they complained of is now long over, so that there is no meaningful

under § 1997e where prisoner plaintiff sued only for money and Ohio's administrative procedures barred recovery of money).

Furthermore, as the Sixth Circuit noted, in most cases the administrative process would now be time-barred. *Wright*, 111 F.3d at 422. And if Judge Merritt's dissent were right - that the exhaustion requirement is jurisdictional - then the court could not even grant a stay, but would have to dismiss all 500 cases outright, which in turn would raise statute of limitations problems when the inmates re-filed in federal court after "exhausting" the state administrative process. *Id.* at 425 (Merritt, J., dissenting). The Sixth Circuit's decision is sensible if it avoids the prospect of remanding hundreds of cases for futile administrative review, only to have most of them return to the Court of Appeals again after having clogged the dockets of the district courts a second time as well.

Section 803 is problematic for pending cases because it makes administrative exhaustion a prerequisite to filing a federal court action, instead of being grounds for a stay, and it requires exhaustion of "such administrative remedies as are available" without any apparent regard to their appropriateness or efficacy. *See* 42 U.S.C. 1997e(a). Just processing the cases would take hours of staff time for the judicial and executive agencies. The cases could be delayed for years while prisoners re-file grievances and await hearings and administrative appeals, only to be told in the end that their claims are not grievable or are time-barred. To remand all cases for exhaustion now - simply because the PLRA makes exhaustion a *filing* requirement - is to countenance an absurd result.

Given this scenario - which Congress must have recognized - and absent any Congressional intent to the contrary, the exhaustion requirement of § 803 of

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"injunctive" administrative relief that could be granted either.

the PLRA (amending 42 U.S.C. § 1997e) cannot have been intended to apply retroactively to cases filed before the date of the PLRA's enactment.

CONCLUSION

For the foregoing reasons, this Court should not grant the Petition for Writ of Certiorari.

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